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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-757

THE STERLING COLORADO BEEF COMPANY, *Appellant*,

v.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, BURLINGTON NORTHERN, INC., *et al.*, *Appellees*.

On Appeal from the United States District Court for the District Court of Colorado

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court (App. 1a) is not yet reported. The opinion of the Interstate Commerce Commission (App. 13a) is reported at 344 I.C.C. 299 (1973). The opinion of Division 2 of the Interstate Commerce Commission is reported at 340 I.C.C. 214 (1970).

JURISDICTION

This action was brought under 28 U.S.C. 1336, to set aside an order of the Interstate Commerce Commission. Pursuant to 28 U.S.C. 2284, 2321 and 2325, the case was heard and decided by a three-judge district court. The judgment of the three-judge district court was entered on August 17, 1976 (App. 8a). A petition for rehearing, timely filed, was denied on August 31, 1976 (App. 9a). Notice of appeal was filed on October 4, 1976 (App. 10a.). The jurisdiction of this Court to review the judgment of the district court on direct appeal is conferred by 28 U.S.C. 1253 and 2101 (b). *United States* v. *Dixie Highway Express, Inc.*, 389 U.S. 409 (1967); *Illinois Central Railroad Co.* v. *Norfolk & Western Railway Co.*, 385 U.S. 57 (1966); *United States* v. *Saskatchewan Minerals*, 385 U.S. 94 (1966).

QUESTIONS PRESENTED

1. Whether the district court, by (1) failing to identify the "substantial evidence" which supposedly sustains the ICC decision and (2) citing factors in support of that decision which have no rational relationship to the agency determination, abdicated its judicial responsibility as a reviewing Court in contravention of the standards laid down by this Court in *Bowman Transportation, Inc* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974).

2. Whether the railroads should be permitted *carte blanche* to group origins for rate-making purposes despite the lack of any case-by-case justification, provided only that no more than 25% mileage difference separates origins within the group.

STATUTE INVOLVED

Section 1(5) of the Interstate Commerce Act, 49 U.S.C. 1(5) [1] provides in pertinent part as follows:

> All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

STATEMENT

In the spring of 1970 the nation's railroads filed new tariffs which restructured TOFC [2] meat rates throughout the country. After protests were filed by appellant and others, the Interstate Commerce Commission suspended the effective date of these tariffs and ordered an investigation into their legality. *Meat & PHP, TOFC ETC.*, 344 ICC 299 (1973), *aff'd*, —— F. Supp. — (1976) (hereinafter the *Meat Case*).

The railroads' justification for the higher rates was that their costs had increased and the old rates were no longer compensatory.

Most of the proposed new rates, like all of the old ones, were distance-related. However, certain of the new local western rates [3] were based on the grouping

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[1] The recent amendments made by Section 202 of the Railroad Revitalization and Regulatory Reform Act of 1976, P.L. 94-210 (90 Stat. 34-35) are inapplicable to this case. However, the new Act, like the old, prohibits unjust and unreasonable rail rates.

[2] TOFC stands for Trailer-On-Flat-Car and refers to a "piggyback" mode of transportation in which a trailer capable of being hauled over highways by a motor rig is carried over long distances on a railroad flat car.

[3] Local western rates are rates from points in Western Trunk-line Territory to Chicago, Illinois.

of origins; that is, the rate for all origins within the group was the same despite the differences in distance from origin to destination. Among the origins grouped on these Chicago rates were Sterling, Colorado (where appellant is located) and Denver, Colorado, which is 123 miles further west.[4]

Sterling argued before the Commission that the railroads' increased costs should not be passed on to shippers disproportionately, that if rates were to be raised, the increase should be applied *pro rata*. The need for increased revenue, Sterling argued, provided no justification for origin grouping.

The evidence Sterling presented to the Commission may be succinctly stated (this evidence is summarized in Appendix B of Division 2's opinion (340 I.C.C. at 261-263)):

(1) Since the introduction of TOFC rates in 1959, the rates had been distance-related. Moreover, boxcar rates, which had previously moved the traffic, were also distance-related. Thus, a historical rate relationship was being disturbed by the proposed origin grouping. (2) *All* other TOFC meat rates *within* and *to* other parts of the country were distance-related, *including TOFC meat rates from Colorado to the west.* On these west coast shipments, Sterling suffered a geographical disadvantage and therefore a rate disadvantage. Thus, Sterling argued, the proposed group rate deprived Sterling of the benefit of its natural geographic advantage of promixity to Chicago. (3) The proposed group

[4] This Chicago rate was especially important to Sterling because the rate was used not only on shipments to Chicago, but also as a "factor" in the construction of so-called combination rates on shipments to east coast destinations.

rate resulted in the railroads' receiving a substantially higher rate of return on shipments from Sterling than on comparable shipments from a multitude of other origins, including Denver. (4) Finally, Sterling argued, the railroads had attempted only a short time before to group Sterling with Denver and its environs with respect to this same Chicago rate, but the Commission had ruled that grouping Sterling with Denver was unjust and unreasonable, and therefore unlawful, in violation of Section 1(5) of the Interstate Commerce Act. *Sterling Colorado Beef Co.* v. *Atchison, T. & S. F. Ry. Co.*, 339 I.C.C. 530 (1971) (hereinafter the *Sterling Case*) (App. 53a).[5] In the *Sterling Case*, the Commission had ordered the railroads to give Sterling the benefit of distance-related rates vis-a-vis Denver on Chicago shipments. The Commission had also ordered the railroads to pay Sterling reparations for the excess charges on shipments which terminated in Chicago.[6]

[5] At the time the Commission filed its initial decision in the *Meat Case*, Sterling's Complaint case had not yet been reviewed at all levels of the Commission, although two tribunals within the Commission had ruled the Chicago rate which Sterling had challenged was indeed unlawful. This ruling was subsequently affirmed by Division 2 of the Commission, the highest level of the Commission's many-layered appellate tribunals to which an appeal may be taken as of right. The railroads' Petition for General Transportation Importance (a discretionary appeal to the full Commission) was denied.

[6] The Commission, however, denied Sterling reparations on shipments which terminated east of Chicago, even though those shipments moved via the illegal rate. In the same three-judge complaint out of which this appeal arose, Sterling claimed that the Commission ruling denying reparations was erroneous. The three-judge district court agreed with Sterling; and the railroads have appealed to this Court from that ruling. *Burlington Northern, Inc., et al.* v. *Sterling Colorado Beef Company*, No. 76-672.

Sterling's arguments were unsuccessful. In the *Meat Case* the Commission for the first time approved origin grouping as a general principle and ruled that the railroads were free to group origins without case-by-case justification, provided only that a mileage difference of no more than 25% separated origins within the group. The Commission reached this conclusion based on an analogy to a rule applied in so-called Port Cases[7] in which rates to and from different ports are equalized to encourage competition between ports.

Nevertheless, mindful of its earlier decision in the *Sterling Case*—a decision on which the ink had barely dried—the Commission ruled that Sterling could *not* be grouped with Denver and its environs. The Commission "require[d] the removal of [Sterling] . . . from the Denver group (App. 38a). In response to a railroad petition for clarification, the Commission (by order dated November 16, 1973) (App. 47a) stated:

> Sterling, Colo., must be included in a lower-rated group than Denver, Greeley, and Pueblo, Colo., to comport with the tenor of the result in Sterling Colorado Beef Co., v. Atchison, T. & S.F. Ry. Co., 339 I.C.C. 530 [the *Sterling Case*] [App. 48a].

In response to this Commission order, the railroads created a new "group", in which Sterling was the only member; the railroads then published a rate for Sterling which was one cent below the Denver rate.

At this point, Sterling went back to the Commission with its own petition for clarification. In response thereto, the Commission (in an order dated August 21, 1974) stated that what the railroads had done did "not

[7] Chiefly, *City of Wilmington* v. *Alabama G.S.R. Co.*, 316 I.C.C. 709 (1962).

constitute bona fide compliance with the order entered in the *Sterling Case*" (App. 50a). The Commission ruled that the rate which the railroads sought to impose on Sterling "merely constitutes a lesser form of unjust discrimination against Sterling, Colo.", observing that "the geographical advantage of Sterling, Colo. has been nullified by carrier action" (App. 50a).

However, the Commission failed to order the railroads to set the Sterling rate at 14-15 cents below the Denver rate, as it had done in the *Sterling Case*.[8] Instead, the Commission ordered the railroads to give Sterling a mere 5 cent differential below Denver.[9]

After another futile petition for clarification (App. 51a-52a), Sterling filed its complaint in the district court to review this Commission decision.[10]

In the district court, Sterling argued that (1) the Commission erred in creating a general rule that per-

[8] The differential ordered in the *Sterling Case* had increased to 23-24 cents by the time of the *Meat Case* as a result of ex parte percentage increases.

[9] The differential ordered by the Commission was 5 cents in terms of the level of rates which existed at the time the railroads originally proposed to increase the rates. By the time the *Meat Case* was decided subsequent ex parte increases had increased the differential to 6 cents.

[10] The same complaint also sought review of the Commission's decision in the Sterling Case denying Sterling reparations on shipments to destinations east of Chicago (see footnote 6). That decision, however, is not the subject of Sterling's appeal here, although the railroads are seeking review of the three-judge decision agreeing with Sterling on this point.

Sterling also filed a protective single-judge complaint, which was consolidated with the three-judge complaint. Review is sought here only of the district court's decison in the three-judge complaint case.

mitted grouping without case-by-case justification. The Commission's analogy to the Port Cases was not apt, Sterling argued, because the Port Cases allowed grouping in order to encourage port competition; no analogous policy consideration was present in the instant case; and (2) the Commission erred in denying Sterling distance-related rates because there was not a single consideration which militated *against* distance-related rates, while a host of factors pointed toward Sterling's entitlement to distance-related rates.

The district court, however, sustained the Commission's decision.

The district court did not discuss whether the Commission properly formulated a general rule allowing grouping without case-by-case justification. Nor did the district court consider whether the rule developed in the Port Cases was properly applicable to non-Port cases.

The district court formulated the issue in the case as follows: "The question here is whether the Commission's decision to permit the grouping of origins for rate-making purposes is so lacking in reason and factual support as to be considered arbitrary" (App. 5a). The Court found that there was substantial evidence to support the administrative decision, but the Court never identified what that evidence was or why that evidence supported the Commission's decision to permit origin grouping. The Court stated only that "In our view, there was substantial evidence in the administrative record to show traffic flow, distribution of terminal costs, empty-trailer return ratio to volume of TOFC traffic and motor competition to support the determination of the Commission" (App. 6a). What this evidence was, and, more important, why this evi-

dence would justify grouping or the denial to Sterling of distance-related rates, the district court did not say.

The district court simply affirmed the Commission's decision without analysis or explanation, and this appeal followed.

THE QUESTIONS ARE SUBSTANTIAL

Probable jurisdiction was noted in *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974), because the three-judge district court in that case had paid inadequate deference to the ICC's decision. This Court's decision in that case neither broke new ground, nor enunciated new doctrine. Instead, it provided the bench and the bar with a first rate example of how a court should review an agency decision, neither abdicating its responsibility as a reviewing court nor trenching on the agency's prerogatives. Justice Douglas's opinion for a unanimous court was intended to set a standard by example.[11]

A comparison of the *Bowman* opinion with the district court's opinion in this case will amply demonstrate that the district court substantially departed from the standards of analysis implicitly required by

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[11] *Cf. Atchison T. & S. F. R. Co.* v. *The Wichita Board of Trade*, 412 U.S. 800, 802 (1973), where Mr. Justice Marshall stated: "we noted probable jurisdiction in these cases to resolve two important questions relating to the proper role of courts in reviewing approval by the Interstate Commerce Commission of proposed rate increases by railroads . . . First, under what circumstances may a reviewing court find that the Commission has failed adequately to explain its apparent departure from settled Commission precedent?"

the *Bowman* case. More particularly, the district court failed to identify the substantial evidence which purportedly supported the administrative decision and also failed to explain how the purported substantial evidence rationally related to the agency result.

In short, while the district court in *Bowman* ran rough-shod over the agency decision, the district court here abdicated its reviewing function. This Court's selective intervention is required equally when a district court errs in one direction as another. Here its intervention is required to correct by example the district court's failure to properly fulfill its reviewing function. As this Court has recently stated, general principles of judicial review "gain content when applied" (*Atchison, T. & S. F. R. Co.* v. *Wichita Board of Trade,* 412 U.S. 800, 809 (1973)); a statement of general principles is not adequate guidance to lower federal courts. This Court must guide by example, by giving general principles content through their application in specific cases.

This case is also important because the validity *vel non* of origin grouping is of enormous significance in the structuring of freight rates. The ICC's decision here, now sustained by the district court, gives carriers for the first time *carte blanche* to group origins, provided only that the 25% rule is observed. In creating this rule, by analogy to the Port Cases, the ICC gave no indication of the factors which should govern the validity of grouping in a particular case or in this case —and rejected a case-by-case approach based on an analysis of the relevant factors. The importance of this question alone justifies this Court's review.

1. To justify the agency decision, the district court stated:

> In our view, there was substantial evidence in the administrative record to show traffic flow, distribution of terminal costs, empty-trailer return ratio to volume of TOFC traffic and motor competition to support the determination of the Commission (App. 6a).

What was the traffic flow, the distribution of terminal costs or the empty-trailer return ratio? Not a word is said by the district court.

Sterling agrees that "the ultimate standard of [judicial] review is a narrow one" (*Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 416 (1971)), but regardless of how narrow the standard of review is, the reviewing court must make an "inquiry into the facts [which] is to be searching and careful" (*id.*). The district court here plainly failed to make that kind of inquiry.

Although the Court in *Overton Park* was speaking with reference to review under the arbitrary and capricious standard, the same searching, factual inquiry is required under the substantial-evidence standard as well. Ironically enough, it was the Tenth Circuit that recently stated: "In the typical substantial evidence review under [APA] section 706(2)(E), the 'substantial inquiry' in which the district court is required to engage [citation omitted] will require a finding of fact or facts as to what is the substantial evidence which supports the agency determination." *Nickol* v. *United States,* 501 F.2d 1389, 1392 (10th Cir. 1974) (emphasis in original). That is precisely what the district court in the instant case failed to do.

But setting forth only the facts is insufficient. In addition, "[t]he agency must articulate a 'rational connection between the facts found and the choice made' *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 162 (1962)." *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc., supra,* 419 U.S. at 285. As the Court noted in the *Burlington* case, "Expert discretion is the lifeblood of the administrative process but, 'unless we make the requirements for administrative action strict and demanding, *expertise,* the strength of modern government, can become a monster which rules with no practical limits on its discretion.' *New York* v. *United States,* 342 U.S. 882, 884 (dissenting opinion)" (371 U.S. at 167) (emphasis in original).

Even if we assume that by combing the administrative record we can identify the evidence relating to traffic flow, distribution of terminal costs and empty-trailer return ratios (which the district court says supports the agency decision), this still leaves a critical question unanswered. How is this evidence rationally related to whether origin grouping should or should not be permitted? What kind of traffic flow suggests that grouping is allowable or that it is not? What kind of distribution of terminal costs or empty-trailer return ratios supports grouping or militates against it? Again we are left completely in the dark. We are reminded of Learned Hand's description of "lazy judges" who "win the game by sweeping all the chessmen off the table".[12]

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[12] Learned Hand, "Mr. Justice Cardozo" in Irving Dillard (ed.) *Spirit of Liberty* (Vintage ed. 1959), p. 100.

True, the district court also found that grouping was justified by certain other factors which it quoted from the ICC opinion:

> . . . . we will not prescribe a distance-oriented schedule of rail rates *to compete with prevailing motor carrier rates* where (1) the railroads are not obtaining their variable costs from the service, (2) shippers of meat have relied more and more on motor carrier service, and (3) the motor carriers have a distinct service advantage. We consider a greater discretion to adjust rates particularly important for the carriers in situations like those present here where the increases involved will not return excessive profits to the carriers [App. 7a] [emphasis supplied].

The district court did not explain what these factors had to do with the propriety of permitting grouping. If the railroads were not recovering their variable costs, the Commission could have corrected this by authorizing a higher level of distance-related rates. In this way, the burden of the railroads' need for increased revenue would fall on shippers proportionately. If shippers have been relying more on motor carriers which have a district service advantage, what does this have to do with whether grouping is permissible? Nothing that we can discern.

Moreover, this passage from the Commission's decision, by its very terms, attempts only to explain why the Commission is not requiring lower rail rates "to compete with prevailing motor carrier rates". The passage does not purport to explain why the railroads were permitted to group origins.

The factors referred to by the district court could just as easily have been used to justify distance-related rates if that is what the Commission had ordered and the district court wished to sustain that decision.

Moreover, the passage quoted is taken from a section of the *Meat Case* opinion entitled "Section 3 issues", which deals with allegations of unduly prejudicial and preferential rates. The question here, as well as in the district court, is whether origin grouping violated Section 1 (unreasonable rates), not Section 3, of the Interstate Commerce Act. In the *Sterling Case,* the Commission had held that grouping Sterling and Denver violated Section 1, not Section 3; therefore, in the *Meat Case* Sterling's principal attack on grouping was based on Section 1. To determine whether the Commission's decision to permit origin grouping was proper in face of a Section 1 attack, the district court should have looked at that portion of the ICC opinion labeled "Section 1 issues" (App. 24a). A specific subsection of that part of the opinion is labeled "Local western rates" (App. 27a). If the Commission's decision is to be sustained, it must be sustained on the basis of that subsection of the opinion (App. 27a-29a), not on the basis of the Commission's discussion of other issues. (In its Section 1 discussion the Commission does not even deal with the issues we raise here.)

In the classic words of Mr. Justice Murphy in *SEC* v. *Chenery Corp.,* 332 U.S. 194, 196 (1947):

> ... [A] reviewing court, in dealing with a determination or Judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm

> the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.[13]
>
> We also emphasized in our prior decision an important corollary of the foregoing rule. If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive.

Moreover, even assuming *arguendo* that the conditions recited in the quoted passage from the Commission's decision might justify origin grouping, these conditions were not present in the case of Sterling and Denver. The fact is that the railroads had been recovering, and under the proposed new rates would continue to recover, their variable costs from TOFC service from Colorado. This was established by the railroad's own evidence. (Even without the proposed new rate increase, the railroads were recovering 104.0% of their variable costs on Denver shipments and 108.2% on Sterling shipments).[14]

There is simply not a single factor which the railroads, the Commission or the district court have identi-

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[13] Neither can the Commission's decision be upheld on the basis of appellate counsel's *post hoc* rationalizations for agency action. *Federal Power Commission* v. *Texaco, Inc.,* 417 U.S. 380, 397 (1974).

[14] This is reported in Appendix F (column 19, lines 31, 34) to Division 2's opinion in the *Meat Case,* 340 I.C.C. at 269 (1970).

fied which would point toward, let alone justify, a denial to Sterling of distance-related rates vis-a-vis Denver.

The *Meat Case* also inexplicably repudiates the Commission's own ruling in the *Sterling Case,* without any attempt to harmonize the holdings of the two cases. Indeed, the Commission failed even to cite the *Sterling Case* in its discussion of our Section 1 attack on the proposed rates. (The only mention of the *Sterling Case* is in the Commission's discussion of the "Section 3 issues" (App. 30a)).

In another case that originated at the Interstate Commerce Commission and which also involved what appeared to be a departure from prior precedent (as this case departs from the *Sterling Case*), this Court, speaking through Mr. Justice Frankfurter, held that "the [Interstate Commerce]Commission has not adequately explained its departure from prior norms and has not sufficiently spelled out the legal basis of its decision." *Secretary of Agriculture* v. *United States,* 347 U.S. 645, 653 (1954). Clearly the *Meat Case* opinion did not adequately explain its departure from the *Sterling Case.*[15] In the *Secretary of Agriculture* case

[15]The district court seemed to feel that the major restructuring of rates involved in the *Meat Case* might justify a departure from the precedent established by the *Sterling Case:* According to the district court, "the [*Sterling Case*] is not comparable with the [*Meat Case*] because the focus of the inquiry in the two cases was much different" (App. 7a).

The district court never explained this distinction, or why it should make a difference in the result. Certainly it was possible to give Sterling distance-related rates, as many origins in Western Trunkline Territory were given on this local western rate (App. 46a) without disturbing other groupings. The Commission noted that many origins in Western Truckline Territory had "individual point-to-point rates" (App. 33a).

Moreover, the Commission itself has held:

> "The fact that the adjustment to the prejudiced and preferred points is a part of an extensive group adjustment, is not a valid excuse." *Oklahoma Corp. Comm.* v. *Kansas, O. & G. Ry. Co.,* 266 I.C.C. 495, 501 (1946).

Although the quoted passage refers to a Section 3 violation, it applies equally to a Section 1 violation.

(374 U.S. at 654), this Court quoted with approval from a landmark decision by Mr. Justice Cardozo in which he stated: "The difficulty is that [the Interstate Commerce Commission] has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. . . . We must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States* v. *Chicago, M. St. P. & P. R. Co.,* 294 U.S 499, 510, 511 (1935). Here the district court failed to hold the Interstate Commerce Commission to this standard.

2. A very large number of cases before the Commission have involved rates in which origins have been grouped to some extent and in certain circumstances. Indeed, one of the protestants in the *Meat Case* submitted a listing of such cases that was over 80 pages long. (Statement Submitted by American Beef Packers, Inc., in Support of Petition for Clarification (January 6, 1975)). The Commission cited none of these cases (relying only on the Port Cases, by way of analogy), for the obvious reason that none of the cases provided a reasoned statement of the principles that govern origin grouping in this context and none adopted a general rule allowing grouping without

case-by-case justification. The *Meat Case,* therefore, is the first case in the Commission's history in which the Commission has confronted the propriety of origin grouping as a general rate-making principle. This gives the case extraordinary substantive importance.

Our own combing of this record has produced almost nothing in the way of evidence which even arguably supports the railroads' efforts to group origins which are many miles distant from one another. And neither the railroads, the Commission, nor the district court have cited us to any evidence.

The railroads' witness on this subject explained that the placing of origins into a group was "just the judgment of the traffic officers that made the rates" (Tr. 113).[16]

The railroads evidence in the case related almost exclusively to its increased costs. But even its own evidence revealed that the cost of a Denver shipment to Chicago was 6.8% more than the cost of the same shipment from Sterling, so that similar costs could not justify the grouping.[17]

At the argument before the district court, the court questioned Government counsel regarding the justification for grouping Sterling with Chicago on the local western rate. Government counsel's familiarity with the case was recent, so after making a vague reference to motor competition, he deferred to railroad counsel

[16] "Tr." refers to the transcript of testimony before the Interstate Commerce Commission.

[17] It cost the railroads $873.28 to carry an 80,000 pound shipment from Sterling to Chicago, but $931.64 to carry the same shipment from Denver to Chicago (See 340 I.C.C. at 272).

(App. 11a). Railroad counsel too sought to justify the grouping on the basis of motor carrier competition (App. 11a-12a). However, the railroads had introduced no evidence with regard to motor carrier rates or motor carrier competition. This omission was *not* inadvertent; the railroads deliberately abandoned any effort to be motor competitive in the proposed rates and so advised the Commission. As Division 2's opinion in this case states:

> In the instant proceeding, the respondents [i.e., the railroads] stress that due to the rail industry's declining profit picture, it became necessary to reappraise the TOFC meat rate structure as a result of the rails' serious concern as to the non-compensativeness of the existing rate level and their realization that it was essential to propose rates on meat that were "cost oriented" *rather than motor competitive* [340 I.C.C. at 228].[18] [emphasis supplied].

Naturally, in these circumstances the Commission could not and did not justify its decision on the basis of motor carrier competition. However, it is interesting that when faced with the direct question on oral argument as to the justification for grouping, both government counsel and railroad counsel referred only to motor carrier competition, although this is clearly inadequate, especially in face of the Commission's failure to base its decision on this ground.

The reason why counsel had so much difficulty—a difficulty they shared with the district court—in finding a factual justification for the Commission decision

[18] The full Commission's opinion states, "The evidence of this proceeding is addressed to the compensativeness of the proposed rates in terms of the carriers out-of-pocket costs" (App. 17a-18a).

approving grouping is that the Commission did not justify its grouping decision by facts related specifically to this case. Instead, the Commission based its decision on a *general rule* adopted by analogy from the so-called Port Cases. The Commission stated:

> The carriers have structured the local western rates into 13 different origin groups (all points within the groups taking the same rates), and additional individual point-to-point rates. . .
>
> The carriers defend the proposed structure on the basis of the *City of Wilmington* principle that recognizes the reasonableness of a 25 percent maximum difference in distances between equalized groups. We believe that the *Wilmington* principle has application to the issues presented in this proceeding. . .
>
> We believe, and shall more fully explain below, that analogous with the trend of our port cases, we should not require the carriers here to adhere to any formula based on rigid adherence to distance. . .
>
> We ruled in a series of cases involving competition among the Nations' ports that we would not strictly adhere to the distance principle. Yet, even in the face of a strong congressional policy favoring competition among the ports, the Commission stated that competition would be required within "reasonable limits," which translated into a requirement of equal rate treatment of a port from points that were no more than 25 percent more distant from another and closer port. . .
>
> The standard we have employed in the *City of Wilmington* case and will adapt to the present proceeding, we believe, accords the carriers a reasonable flexibility to define the rate structure without depriving shippers and communities of natural

> advantages nor subjecting them to undue prejudice.
>
> In the port cases, we have attempted to develop guidelines for requiring the railroads to permit competition among the Nation's ports. We believe these precedents provide a useful guideline for the present proceeding. By adopting a maximum limitation on the grouping of points, rather than a distance scale, all shippers and localities are treated fairly, and yet the railroads gain a freer hand to adjust rates in response to competition [App. 33a-40a].

We have already suggested that the Port analogy is not apt. No policy consideration analogous to the public interest in equalizing port rates to encourage competition between ports supports the equalization of rates to encourage competition between Sterling and Denver. But the district court did not even discuss this issue.

The ultimate irrationality in the Commission's decision is reflected in the fact that as to all so-called overhead rates (single-factor through rates from western origins to the east coast), the railroads continued to base their rates on distance rather than the grouping of origins. As the Commission noted in this case:

> The carriers gave primary consideration to distance and costs in proposing a revision of the overhead rates. In so doing, they preserved the primary distance relationships among the overhead rates [App. 30a].

The grouped local western rates to Chicago are also used as part of combination rates on shipments to the east coast. These combination rates consist of the sum of (i) the local western rate from the point of origin

to Chicago and (ii) the local eastern rate from Chicago to the point of destination. Thus, the railroads seek to group Sterling with Denver for purposes of combination rate shipments to the east coast, even though on the overhead (direct) rates to east coast destinations, Sterling is not grouped with Denver, but rather is accorded the natural benefit of its geographic location in relation to the destination. No rational explanation has ever been given by the Commission or by the district court for this distinction.

That the railroads accord Sterling and Denver distance-related *overhead* rates also emphasizes how easy it would be to accord then distance-related local western rates.

We agree that distance should not be—and, under the statute, is not—the sole basis on which rates should or must be constructed. A host of other factors are relevant and important, including costs, the nature of the competition, the needs of a balanced national transportation policy, environmental factors, etc.

But it is equally important that the factors which go into the rate making decision be identified in each case and rationally related to the result. To adopt a general rule without requiring case-by-case justification, as the Commission has done, is to abandon the statutory requirement that all rates must be "just and reasonable." Perhaps the Commission chose this course because it could not otherwise justify the treatment accorded Sterling in this case—although it is difficult to tell from the Commission's opaque opinion. In any event, this question surely deserves more discussion then the district court gave it.

There are some who believe that rate-making cannot be a rational process. Appellant rejects that proposition. In recent years courts have purified the administrative process by demanding that agency decisions reflect an explicitly rational process. That policy should be applied to the rate-making procedures of the railroads as reviewed by the Interstate Commerce Commission.

CONCLUSION

This appeal presents substantial questions of public importance. Probable jurisdiction should be noted.

Respectfuly submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 74-A-179

THE STERLING COLORADO BEEF COMPANY, *Plaintiff*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, BURLINGTON NORTHERN, INC., ET AL.,
Defendants

Civil Action No. 74-M-221

THE STERLING COLORADO BEEF COMPANY, *Plaintiff*,

v.

BURLINGTON NORTHERN, INC., ET AL., *Defendants*

MEMORANDUM OPINION AND ORDER

(Filed August 4, 1976)

There are two questions to be answered by this three-judge court in these consolidated proceedings for judicial review of decisions of the Interstate Commerce Commission pursuant to statute.

While these questions have a common factual basis, they arise through separate records of administrative proceedings and a different focus with respect to the standard of judicial review.

I.C.C. Docket No. 35021 was a complaint by Sterling Colorado Beef Company that the actions of the railroads in establishing group rates for the shipments of fresh meat and meat by-products by trailer on flatcar (TOFC) carloads was an unjust and unreasonable charge in violation of 49 U.S.C. § 1(5) and resulted in undue prejudice or preference in violation of 49 U.S.C. § 3(1). More particularly, the plaintiff complained that it was placed in a competitive disadvantage with other shippers in the group. The spe-

cific grouping involved was that shipments from Sterling, Colorado, Denver, Colorado, Greeley Junction and Pueblo, Colorado, all paid the same rate to Chicago even though Sterling is approximately 140 miles closer to Chicago than the farthest of the other grouped points.

The result of this complaint was a long and tortured maze of administrative proceedings, with appeals, reconsiderations and adjustments. The final result was a decision that the group rate was "relatively unreasonable" as applied to the plaintiff and a correction was ordered. Additionally, the plaintiff was awarded reparations for shipments from Sterling to Chicago; but, it was denied any payment for shipments through Chicago to termination points east of that city. Those shipments were made on combination rates whereby two independently published charges, the Sterling-Chicago factor and the Chicago-eastern destinations factor, were added to form the combination through rate.

The Commission held that the failure to direct specific proof at the reasonableness of the rates on factors east of Chicago was a fatal defect in the claim for reparations on through shipments to eastern destinations via Chicago.

In reaching that result, the Commission relied upon the authority of *Great Northern Railway Co.* v. *Sullivan,* 294 U.S. 458 (1935). In that case, a wholesale dealer bought carloads of lignite at mines in Alberta, Canada and sold them to dealers in North Dakota. The shipping was accomplished on combination rates using the Canadian Pacific and Great Northern Railway Companies. The combination rates involved in *Great Northern,* however, differed from those here in that rather than combining independently published local rates, the combination was of proportionals, which were used only to divide the through rate between the participating railroads. The Commission found the American proportionals to be unjust and unreasonable

and made no finding about the Canadian proportionals or the overall reasonableness of the combination through rates.

The Supreme Court held that the shipper could not recover damages without showing that the overall combination through rate was unreasonable. Upon the state of the record before the court, it was assumed that the overall rate was, indeed, reasonable.

The unreasonable American proportional did not result in economic injury to the shipper because he made his shipments upon charges which were reasonable in their totality. As we read the *Great Northern* decision, it is simply a recognition of the general principle of law that damages are not recoverable without injury.

That seemed to be the interpretation made by the Commission in deciding *Auburn Mills* v. *Chicago & A. R. Co.,* 222 I.C.C. 495 (1937). There, the shippers did attack the through charges as excessive; but, their evidence related only to one of the combination rates. The Commission ruled that while the other factors might be shown to be so low that, in combination with the excessive rate, the overall charge would be reasonable, it was the responsibility of the railroads to come forward with the evidence concerning the other factors. The plaintiff here claims that this ruling establishes the "Auburn presumption" that where one factor is unreasonable and the through rate is challenged, it is presumed that the other factors are reasonable and that the overall charge is, therefore, unreasonable to the same extent as the excessive factor.

A different reading of the *Great Northern* opinion was used by a majority of the Commission in deciding *United States* v. *Beaumont S.L. & W. Ry. Co.,* 301 I.C.C. 231 (1957). The claim for damages was there denied because the shipper showed only the unreasonableness of one factor where

the other factor in the through rate was agreed to have been reasonable. The Commission said:

> As was true in *Great Northern Ry. Co.* v. *Sullivan, supra,* the complainant's only interest here is that the charge for the through movement shall not be unjust or unreasonable. Thus, where reparation is sought, the total rate, and not just one factor of the through rate, must be shown to exceed a maximum reasonable level . . .

United States v. *Beaumont, S. L. & W. Ry. Co., supra,* at 234.

While the Auburn case was not mentioned, the dissenting commissioners applied the same principle used there.

The decision now before us denied reparations for shipments terminating east of Chicago upon the view that this result was compelled because the plaintiff failed to produce any evidence about the rates east of Chicago. That would appear to be too simplistic an interpretation of *Great Northern.*

To decide this dispute, we need not attempt any definitive interpretation of *Great Northern.* The record before us shows that the plaintiff did sustain economic injury on all of its shipments to the east, regardless of the points of termination. The injury results from the fact that in being required to pay the same rate charges as its competitors located in Greeley, Denver and Pueblo, the plaintiff was denied any opportunity to use its geographic location as a component in its competitive pricing structure. The record shows that meat is sold by quoted prices in the markets with the shippers absorbing transportation costs.

What is most significant here is that this is a case of relative unreasonableness.[1] The Sterling to Chicago factor

[1] The Commission, Division II, in its final *Report on Reconsideration,* 339 I.C.C. 530, 536 (1971), upheld the finding of relative unreasonableness, stating: "A rate may be unreasonable in relation to another, or relatively, as a result of comparing the two."

is unreasonable in the relationship between the rates thus required to be paid from Sterling and that some charge being made for the other shipping points in the group. What is unreasonable is to ignore the geographical differences. That same relationship applies to any shipment going east of Sterling whether the shipment ends in Chicago or any place east of Chicago. The difference between the plaintiff and the shippers from the other locations is exactly the same. Accordingly, our conclusion is that the denial of the reparations claimed by Sterling Colorado Beef on shipments to points east of Chicago is an error of law by the Commission and must be reversed with a remand to reconsider that claim in light of the views expressed herein.

The second question concerns a broader rate proceeding which came before the Commission under I & S Docket No. 8536, referred to herein as the *Meat* case. That resulted from the railroads' publication of several tariffs restructuring TOFC meat rates throughout much of the United States. Again, Sterling was grouped with Denver, Pueblo and Greeley Junction. As one of the shippers involved in that proceeding, Sterling again objected to that grouping and contended that it was entitled to distance-related rates on shipments to Chicago. The Commission did authorize the grouping of local western origins, subject to certain distance limitation and also required that Sterling be grouped with others than the locations involved in the *Sterling* case. The question here is whether the Commission's decision to permit the grouping of origins for rate-making purposes is so lacking in reason and factual support as to be considered arbitrary.

As we have previously indicated, while the questions in the *Sterling* and *Meat* cases are related in that they concern TOFC rates, they are before us on entirely different administrative records. The main thrust of I & S 8536 was the examination of the costs of TOFC service and the

railroads had the burden of justification of their rates. In our view, there was substantial evidence in the administrative record to show traffic flow, distribution of terminal costs, empty-trailer return ratio to volume of TOFC traffic and motor competition to support the determination of the Commission. The adjustment of rates in light of changing technologies and transportation conditions is precisely the kind of delicate balancing process for which the Commission's expertise deserves the most deference:[2]

> The balancing and weighing of these interests is a delicate task. 'Whether a discrimination in rates or services of a carrier is undue or unreasonable has always been regarded as peculiarly a question committed to the judgment of the administrative body, based upon an appreciation of all the facts and circumstances affecting the traffic.' [citations omitted] . . .
>
> . . . There may be differences of opinion concerning the weight to be given to those factors, . . . But their significance is for the Commission to determine; and, though we had doubts, we would usurp the administrative function of the Commission if we overruled it and substituted our own appraisal of these factors . . .

New York v. *United States*, 331 U.S. 284, 347-49 (1947). It is not for the court to re-weigh evidence concerning rate-making determinations, and there was substantial evidence to support the Commission's determinations.

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[2] 49 U.S.C. § 15a(2) enumerates the factors which the Commission must consider in exercising its rate-making powers: "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

The plaintiff complains that what it had won in the *Sterling* case was actually lost in the *Meat* case. We do not believe that the results of the Sterling complaint were controlling in the broader investigation of rates in the *Meat* case. The one is not comparable with the other because the focus of the inquiry in the two cases was much different. The basis of the Commission's decision to permit groupings of origins within specified limits has been delineated adequately to permit judicial review of the policies it is pursuing. *See Atchison, T. & S. F. R. Co.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 809 (1973). To the extent that the groupings of origins in the *Meat* case permitted less consideration of distance factors than previously given on meat shipments or in the *Sterling* case, the restructuring of rate formulation criteria was justified by the factors cited in the *Report and Order of the Commission on Reconsideration*, 344 I.C.C. 299, —, slip opinion, pp. 31-2 (February 9, 1973):

> . . . we will not prescribe a distance-oriented schedule of rail rates to compete with prevailing motor carrier rates where (1) the railroads are not obtaining their variable costs from the service, (2) shippers of meat have relied more and more on motor carrier service, and (3) the motor carriers have a distinct service advantage. We consider a greater discretion to adjust rates particularly important for the carriers in situations like those present here where the increases involved will not return excessive profits to the carriers.

It is also significant to note that TOFC technology is relatively new, the first TOFC rates on meat having been filed in 1959 (see p. 21 of slip opinion). Therefore, no definitive historical rate relationships had been developed for TOFC service.

Our judicial review must be controlled by the limited standard of an error of law or arbitrary and capricious action. There is no controlling law requiring that the

Commission establish rates which are distance related and there is substantial evidence in the record supporting the determinations made. Accordingly, it is

ORDERED that in 74-A-179, the decision is remanded to the Interstate Commerce Commission for further proceedings in accordance with the views expressed herein and in 74-M-221, insofar as the three-judge court issue is concerned, the decision of the Commission is affirmed.

Dated: August 4th, 1976.

BY THE COURT:

/s/ ROBERT H. MCWILLIAMS
Robert H. McWilliams
United States Circuit Judge

/s/ ALFRED A. ARRAJ
Alfred A. Arraj
United States District Judge

/s/ RICHARD P. MATSCH
Richard P. Matsch
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

(Caption Omitted in Printing)

Judgment

Pursuant to and in accordance with Memorandum Opinion and Order signed by the Honorable Robert W. McWilliams, the Honorable Alfred A. Arraj and the Honorable Richard P. Matsch on August 4, 1976, it is

ORDERED that in Civil Action 74-A-179, the decision is remanded to the Interstate Commerce Commission for further proceedings in accordance with the views expressed in

the said Memorandum Opinion and Order, and in Civil Action 74-M-221, insofar as the three-judge court issue is concerned, the decision of the Commission is affirmed.

Dated at Denver, Colorado, this 17th day of August, 1976.

FOR THE COURT:

JAMES R. MANSPEAKER, *Clerk*

By: /s/ Stephen P. Ehrlich

Stephen P. Ehrlich, *Chief Deputy*

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

(Caption Omitted in Printing)

Order

Upon consideration of the Petition for Rehearing, filed by The Sterling Colorado Beef Company, August 16, 1976 and upon the conclusion that the petition is without merit, it is

ORDERED that the petition for rehearing is denied.

Dated: August 31, 1976

BY THE COURT:

/s/ ROBERT H. MCWILLIAMS
Robert H. McWilliams
United States Circuit Judge

/s/ ALFRED A. ARRAJ
Alfred A. Arraj
United States District Judge

/s/ RICHARD P. MATSCH
Richard P. Matsch
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

(Caption Omitted in Printing)

Notice of Appeal

(Filed October 4, 1976)

Notice is hereby given that The Sterling Colorado Beef Company, plaintiff above-named, hereby appeals to the Supreme Court of the United States from that part of the final order entered in this action on the 4th day of August, 1976, from which plaintiff's timely Petition for Rehearing was denied on the 31st day of August, 1976, insofar as it affirms in Civil Action No. 74-M-221, the decision of the Interstate Commerce Commission in I & S Docket No. 8536.

This appeal is taken pursuant to 28 U.S.C. §1253.

Respectfully submitted,

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(Proof of Service omitted in Printing)

Extracts from Transcript of Oral Argument Before the Three-Judge Court on June 7, 1976

(The complete transcript has been filed with the Clerk)

(Caption Omitted in Printing)

• • • • • • • • • • •

JUDGE MATSCH: What seems disturbing here is when Sterling ships east, its location 120 miles east of Denver is irrelevant. When it ships west, they have to pay for it.

MR. RIPPLE [Government Counsel]: Do you mean west to the West Coast?

JUDGE MATSCH: There you have got a mileage related rate.

MR. RIPPLE: As they do have a mileage related rate to the East Coast beyond Chicago.

JUDGE MATSCH: Yes.

MR. RIPPLE: I can['t] answer it quickly. I will defer to my brother more on that, but I believe the more of the competition—that the motor carrier competition is different on these different segments, and there is a basis for it.

I hate to cut it off at that, but I am not that comfortable with it, Your Honor. I would like to defer to my brother on that [Tr. 32-33].

• • • • • • • • • • •

MR. SCHREIBER [Railroad Counsel]: . . . So historical relationship of the TOFC or piggyback rates only dates from the mid-1960's. It was an attempt by the railroads to be motor carrier competitive. And in so doing, the rate structure was established, and the evidence of record in both dockets will substantiate this, was to meet the motor carrier competition.

Now, the situation in Colorado was that the motor carriers had grouped all the Colorado origins on the—on their

tariffs to Chicago, and that was the primary motor carrier competitive track because to destinations east of Chicago, the motor carriers were not as competitive because of the distances involved, so that was the reason for the rail carriers to establish the origin grouping concept in the first place [Tr. 38-39].

* * * * * * * * * * *

JUDGE MATSCH: . . . [W]hat I don't understand is what the Commission had to go on to say that you have a latitude of 25 per cent because there is some kind of justification for that.

My understanding of this record is that's pretty much out of an air figure. We will let you play around within the latitude of 25 per cent.

MR. SCHREIBER: If you can justify the concept of origin grouping in the first instance, and that would mean that *there would have to be competitive factors as we contend there are in this case, relating to the motor carrier compe-[ti]tion and piggyback meat traffic.*

They have always had origin groupings from Colorado origins to Chicago, yet, Sterling Beef has never attacked that origin concept when utilized by the motor carriers, but they do so in an effort to obtain what we feel in ICC Docket 35021 is an additional windfall reparation award over and above what they have already received from the rail carriers as a result of the split two to one decision of Division 2 [Tr. 47-48] [Emphasis supplied].

* * * * * * * * * * *

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. 8536 (SUB-NO. 1)[1]

MEAT & PHP, TOFC, SWL, WTL, OFFICIAL TERRITORIES

Decided February 9, 1973

1. Proposed increased or revised plan II and plan III/2 trailer-on-flatcar rates and charges on fresh or salted meats and packinghouse products, in single-trailer shipments, from western trunkline and southwestern territories to Chicago, Ill., St. Louis, Mo., and other border points, within official territory, between points in western trunkline and southwestern territories, and from certain points in western trunkline and southwestern territories to certain points in official territory, found just and reasonable in certain instances and not shown to be just and reasonable in others. Schedules ordered canceled to the extent found not shown lawful without prejudice to the establishment of schedules in conformity with the conclusions reached in the report.
2. Proposed plan V trailer-on-flatcar rates and charges on fresh or salted meats and packinghouse products from points in western trunkline territory to points in official territory, found not shown to be just and reasonable. Schedules ordered canceled.
3. Proposed cancellation of plan II and II 1/2 trailer-on-flatcar rates on fresh or salted meats and packinghouse products, in two-trailer shipments, between points in western trunkline and southwestern territories, and from points in western trunkline and southwestern territories to certain points in official territory, found just and reasonable.
4. Proceedings discontinued.

Appearances as shown in prior report, and, in addition, *Terrance D. Jones* and *Leslie R. Kehl* for protestants.

REPORT AND ORDER OF THE COMMISSION ON RECONSIDERATION

BREWER, *Commissioner:*

In the prior report and order, 340 I.C.C. 214, division 2 found just and reasonable in certain respects and not shown to be lawful in other respects proposed increased or revised trailer-on-flatcar (TOFC) rates and charges on fresh or salted meats and

[1] This report embraces I. & S. Docket No. 8536 (Sub-No. 2), Meat and PHP, TOFC, Southwestern-Western Trunk Line Terrs.; and I. & S. Docket No. 8536 (Sub-No. 3), Meats and PHP, West and Southwest to the East.

packinghouse products, from western trunkline (WTL) and southwestern (SWL) territory origins to Chicago, Ill., and St. Louis, Mo., and other so-called western border points, and between points in WTL and SWL territories (local western rates); within official territory (local eastern rates); and from certain WTL and SWL points to various points in official territory (overhead rates).

The rates in issue involve transportation under TOFC plan II, plan II1/4, plan II1/2, and plan V. Briefly, plan II provides that the railroad will furnish trailers and pick up shipments from shipper's dock or facility at origin and deliver them to consignee's facility at destination. Similarly, under plan II1/4 and plan II1/2 trailers are furnished by the railroad, but the railroad provides only pickup with its ramp-to-ramp service between TOFC facilities under the former plan and omits both pickup and delivery service under the latter plan. The proposed plan V involves either joint motor-rail or rail-motor service with trailers supplied by either motor or rail carrier and is a service from shipper's dock or facility at origin to carrier's destination ramp where the consignee must accept delivery.

Upon the various petitions of protesting meatpackers and shipper associations for reconsideration and for other relief to which the respondent railroads replied, these proceedings were reopened for reconsideration on the present record. Moreover, these proceedings have been determined to include issues of general transportation importance. The underlying facts were thoroughly detailed in the prior report and, except as necessary to the discussion herein, will not be restated.

PROPOSALS

In Sub-No. 1, by schedules filed to become effective April 11, 1970, the respondents proposed to establish plan II single-trailer local western rates from WTL and SWL origins to East St. Louis, Peoria, and Chicago, Ill., St. Louis, Mo., and Milwaukee, Wis., plan II1/2 single-trailer local eastern rates, and plan V single-trailer overhead rates.

The plan II local western rates are published on two levels, one on boxed meat,[2] minimum 37,000 pounds, and another, uniformly 5 cents higher on suspended meat, minimum 35,000.[3] These rates are based on groupings of the origin points as set forth in the appendix, a technique described more fully later.

[2]Boxed meat herein refers to all types of meat except suspended meats.

[3]These minimum weights are approximations, since the local western rates are subject only to minimum trailer charges.

The plan II 1/2 local eastern rates apply on both boxed and suspended meat, and are published per trailer load, maximum 38,000 pounds, with a rate on the excess weight published in cents per 100 pounds.[4] For example, from Chicago to Pittsburgh, Pa., the proposed charges are $347.26 per trailer, maximum 38,000 pounds, and 85 cents on the excess. The proposed basic rate is approximately 91 cents per 100 pounds, from Chicago to Pittsburgh, if the shipper ships 38,000 pounds, and thereby treats the 38,000 pounds as both a maximum and a minimum; if he ships less than the maximum weight, the basic rate is correspondingly higher per hundredweight.

In Sub-No. 2, by schedules filed to become effective on April 16, 1970, the respondents proposed to establish plan II single-trailer local western rates between points in WTL territory, on the one hand, and points in SWL territory, on the other, and proposed to cancel their plan II two-trailer rates between the same points.

The same differential in rates between boxed and suspended meats discussed with respect to Sub-No. 1 under plan II is proposed.

In Sub-No. 3, by schedules filed to become effective May 30, 1970, the respondents proposed to establish plan II1/2 single-trailer overhead rates and proposed to cancel their plan II1/4 single-trailer rates and plan II1/2 two-trailer rates from and to the same points.

The plan II1/2 overhead rates proposed on single-trailer shipments are joint rates on two levels, one on boxed meat, minimum 37,000 pounds, and another, uniformly 12 cents higher on suspended meat, minimum 35,000 pounds.[5]

In addition, the proposals prohibit by tariff rule the combination of the local western and the local eastern rates, which shippers have heretofore combined to form a through rate on shipments to the East.

[4]Rates, charges, and costs will hereinafter be expressed in cents per hundredweight unless otherwise set forth.

[5]These minimum weights are also approximations, since the proposed overhead rates are subject only to minimum trailer charges. For example, the proposed rate on boxed meat from Denver, Colo., to Pittsburgh, Pa., is $2.31, with a minimum trailer charge of $857.01. Dividing $2.31 into $857.01 yields an approximate minimum weight of 37,000 pounds. The differential between boxed and suspended meat is somewhat higher than 12 cents at the Ex Parte No. 262 level.

Figure No. 1

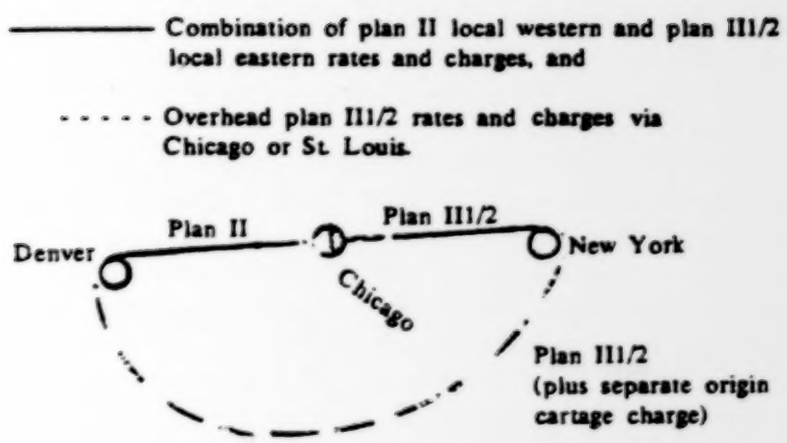


Figure No. 1 depicts the general relationship of the local and the overhead rates in this respect. The carriers proposed to change the overhead plan II 1/4 service, which includes origin cartage, to plan II 1/2 and to charge separately for the pickup service formerly included in the overhead plan II 1/4 rates and charges.

Upon protest of many shippers and shipper organizations, the schedules proposed in these proceedings were suspended. On December 29, 1970, all of the schedules, except one, became effective following the expiration of the period of suspension.

In the prior report, the proposed plan V rates were ordered canceled because they were not supported by adequate cost evidence and thus not shown to be just and reasonable. Inasmuch as the ordered cancellation was not challenged in the petitions, and since we agree that respondents did not sustain their burden of proving the reasonableness of such rates, we shall order their cancellation, and, they will not be further considered. The prior report found the remainder of the proposed rates and charges and the proposed cancellation of the two-trailer rates to be just and reasonable. For convenience, the rates which are in effect will be called the proposed rates.

Positions of the Parties

The petitioning meatpacking companies and shipper associations are located throughout the involved territories. Basically, these shippers fall into four groups, those in the Midwest, Texas, Colorado, and the city of Chicago. Freight rate relationships between competing packers are of vital importance. Protestants

object not only because the proposed rates generally reflect increases ranging from 3 to 47 percent of the prior TOFC rate levels, but also because the proposed increases alter the established rate relationships which the competing origins bear to the same markets.

The Midwest shippers use motor carrier service in varying degrees from almost all the considered origins in Midwest territory despite a shortage of trailers appropriate for this traffic. Shippers consider motor carrier service to be faster and to involve substantially fewer loss and damage claims than TOFC service. These shippers insist that the proposed rate increases are so great that they intend to give all this traffic to the regulated motor carriers or to enter private carriage.

The Texas shippers compete with all the Midwest and Colorado meatpackers for the Chicago market, and with various shippers at Chicago, Detroit, and Cincinnati for the eastern markets. The Texas shippers use motor carriers for some of this traffic, and intend to increase their use of that mode if the proposed rates are approved.

The Colorado shippers use motor carrier service extensively, but those located at Pueblo, Greeley, Sterling, and Denver also ship large quantities of this traffic to the East at the plan II and plan III/2 two-trailer rates which the respondents proposed to cancel. If the proposed cancellation is approved, these shippers insist that they will give all this traffic to motor carriers rather than use the substantially higher plan II and plan III/2 single-trailer rates proposed herein.

The position of the Chicago packers is unusual in certain respects. Chicago packers are primarily purchasers of carcass or dressed cattle and sellers of fabricated meats or carcasses reduced to cuts. As purchasers, the Chicago packers then compete with other purchasers mostly in the larger eastern cities, such as Cleveland, Detroit, Buffalo, Pittsburgh, Washington, D.C., Baltimore, Boston, and especially New York City. The buyers at these eastern points purchase the carcasses from the same midwestern, Colorado, and Texas packers, break the carcasses into cuts, or process them in other ways, and sell them to customers throughout official territory in competition with Chicago.

Cost Evidence

The evidence of this proceeding is addressed to the compensativeness of the proposed rates in terms of the carriers' out-of-pocket

costs. Under our findings in docket No. 34013, *Rules to Govern Assembling & Presenting Cost Evidence*, 337 I.C.C. 298, 326, "*** 'variable costs' are indicative of the minimum level of expenses which must normally be recovered by a carrier in providing particular services." Such costs differ from out-of-pocket costs on this record primarily with respect to the fact that variable costs exclude Federal income taxes. The cost issues on this record do not depend on the distinction between variable and out-of-pocket costs, and we shall accordingly limit our discussion of those issues to out-of-pocket costs, as presented by the parties.

One of the principal reasons given by the protestants as to why the proposed plan II and II 1/2 rates are unreasonably high is that they allegedly exceed by great amounts the cost of transporting this traffic. In the prior report, division 2 restated the cost evidence submitted by the respondents and protestarts. The restatement showed that the proposed local eastern and local western single-trailer rates exceeded the out-of-pocket costs in most of the former and less than half the latter of the instances shown, with the remainder of these rates falling below that cost level. All but four of the overhead rates were found to exceed the out-of-pocket expenses by amounts ranging from 3 to 32 percent.[6]

The Mayer group of petitioners challenge the Commission's acceptance in the cost restatement of all the trailer days, including inactive ones, in the carriers' computations. However, as division 2 correctly pointed out in the prior report (340 I.C.C. at 288):

> The inactive time assignable to each movement has been calculated correctly, since these trailers are used predominantly if not exclusively for the handling of meat. The cost of idle or inactive time must be paid for by the traffic moving in the trailers, and there has been no substantial evidence of record to indicate that a surplus of meat trailers exists. Idle or empty time includes time necessary to clean, pretrip, inspect, perform necessary repairs, hold trailers for substantially heavier end-of-week loading, and movements to and from central distributing points. We agree that these are legitimate times to be assigned to the revenue movements.

Several of the packers ship a majority of their loads during the last 3 days of the week thereby causing some of the inactive time of which they complain. Although the Rock Island apparently bought an oversupply of trailers, it put them to productive use through short-term leasing to the Illinois Central. While the carriers' data is

[6]On reexamination of appendix I of the prior report (340 I.C.C. at 278), we note that the overhead boxed meat rate on movements from Pueblo to Kearney (via the St. Louis gateway) exceeds the out-of-pocket cost by 32.4 percent, rather than 39.6 percent set forth in the prior report (at 245).

not free from error,[7] and more efficient use of equipment may be desirable,[8] in the final analysis, petitioners are incorrect in refusing to recognize the need for some inactive time.

In criticizing both the carriers' utilization of their equipment concerning the assignment of the inactive days and also the very high empty return ratio on the overhead traffic, petitioners point to the much lower empty return ratio on the local eastern traffic. We believe, however, that there is some merit to the position of the carriers that since the refrigerated trailers of the eastern carriers are cleaned in the East (as opposed to those of the western railroads which are cleaned on return to origin), we should expect that the eastern carriers strongly solicit westbound freight for their cleaned equipment, and that the partial success of their solicitation program is shown by the lower empty return ratio for the local eastern traffic. The carriers also, in effect, take the position, with which we agree, that the very high empty return ratio for the overhead traffic reflects a more expeditious return of the trailers of the western carriers than otherwise would be the case if they were always held at eastern destinations awaiting westbound traffic.

Regarding the issue of the empty return ratio, we are concerned about the failure of the respondents to average the prior and subsequent empty movements. While division 2 believed this would have been preferable, it accepted the use of prior empty movements for local western and the western portion of the overhead traffic, and the use of subsequent empty moves for the local eastern and the eastern portion of the overhead. One petitioner emphasizes that, when the Santa Fe initially studied both the prior and subsequent empty movements, the average of the two was several percentage points less than the figure for the prior empty returns, which was used by the carriers in their computations. It may well be that if other carriers had studied both prior and subsequent empty movements, the result of averaging the two figures might in some cases be a percentage higher than the one used by respondents, so that there would be a balancing out, more or less equalling the computations of the carriers.[9] In our judgment, a study of prior empty and subsequent

[7]Some duplication occurred in the counting of trailer days at the points of interchange between the western carriers and the eastern ones.

[8]For example, a witness for the Chicago and North Western noted that returns of empty trailers from eastern connections vary considerably.

[9]We note the comment of a cost witness for the Mayer group of protestants that in past proceedings the carriers have utilized one-half the prior empty movement and one-half the subsequent empty one.

return movements would not materially affect the costs upon which the division and we have relied.

Petitioners next contend that the restatement calculates the running portion of turnaround time purely on the basis of an average haul of 450 miles per day without any reference to the actual distance from and to any of the points to which overhead rates apply. This, they allege, has the effect of overstating the restated costs in the prior report. At page 288 actual distances are discussed as follows:

> [I]n our restatement we have employed a terminal time of 6.49 days origin and destination for all local western movements plus the trailer-days in running service based on the actual miles (short-line miles increased for applicable circuity) divided by 450 miles per day.

The quoted statement makes it clear that actual distances from and to the considered points are used in computing the restated costs for the western local traffic; but the prior report does not make it clear whether actual distances were used in computing the restated costs for the overhead traffic.

A reexamination of the work papers underlying the prior report reveals that actual distances were also used in the computation of the restated costs for overhead traffic. The average (haul loaded plus empty) figures converted to running days were used only to determine the average terminal times for the western and eastern portions of the overhead traffic (340 I.C.C. at 288-289). Thus, there is no merit in this argument of petitioners.

Although there is a dispute between the Mayer group of petitioners and respondents as to whether rubber interchange[10] is more expensive than rail interchange at Chicago and St. Louis, neither showed the cost of the rail interchange or weighted it with the rubber interchange.[11] As noted by division 2, even when the amount of rail interchange is projected as desired by petitioners, the total amount of rail interchange would only be approximately 5 percent of the total interchanges. We are aware that the burden of proof is on the carriers and, while petitioners could have attempted to cost the rail interchange, the carriers themselves would obviously

[10] The term "rubber" is used to refer to the over-the-highway interchange between the ramping facilities of the eastern and western railroads and thus distinguishes this service from the rail interchange of cars at these points.

[11] In the absence of a complete study by the carriers of the relative volume of rail interchange versus rubber interchange, the cost witness for the Mayer group of petitioners used the carriers' rubber interchange expense, as here pertinent, although he stated that such use would result in overstatement to some extent.

be the best source of this data. Notwithstanding, in view of the relatively small amount of rail interchange, we think it very unlikely that the inclusion of such cost on a weighted basis would basically alter the overall cost results in this proceeding. In passing, we note that another group of protestants did not question the carriers' use of only rubber interchange costs.

Moreover, while some petitioners advocate greater use of rail interchange by the carriers, there is some question regarding the feasibility of more rail interchange. Swift, which during a study period had about 37 percent of its loads that were suitable for direct rail interchange, conditioned its nonobjection to such interchange upon maintenance of consistency of "in-transit" service, a condition which it now believed was feasible at Chicago. Armour, which had an equivalent figure of only 15 percent during the study period, indicated that under current operating circumstances in most instances rubber interchange at Chicago afforded better service.

We are concerned over the apparent failure of at least several of the carriers to ascertain whether the detention charges actually collected (and on which the average figures used as offsets to the trailer rental costs were computed) were all the sums which were, in fact, due under the tariffs, and by the apparent evidence that certain amounts of detention or situations potentially giving rise to detention were not accounted for, as alleged by the Mayer group of petitioners. The carriers in reply merely refer to work papers underlying their cost study that simply show the sums of detention they *collected*. Again, however, we are not convinced that the discrepancy materially affects the cost computations on which we have relied.

A separate cost issue concerns the additional expense of transporting suspended meat. Petitioners question two aspects of the cost restatement by division 2 which justify the uniform 12-cent differential in the suspended meat rates over the boxed meat rates on overhead traffic. First, they allege that the restatement assumes that the boxed meat shipments generally weigh over 1,500 pounds more than the shipments of suspended meats. Secondly, they contend that the 12-cent differential contains a cost item for loss and damage claims which reflects an erroneous calculation on the part of the respondents. The respondents obtained this loss and damage cost item from statement No. 5-69, *Railroad Carload Cost Studies by Territories for the Year 1967*. That statement shows the loss and damage payments by commodity groups. For fresh meats the payments were 8.35 cents per 100 pounds for 1967, from which

figure respondents deducted 3.09 cents per 100 pounds, the indicated payments for meat products, to reach the figure of 5.26 cents which the respondents conclude is a reasonable incidence of the greater loss and damage claims against suspended meat. Petitioners stress that "fresh meat" includes such items as boneless meat and sausage material which are not suspended, and thus in their view, the respondents' figure of 5.26 cents per 100 pounds is not entirely accurate.

We are not persuaded that the contention regarding the weights used by division 2 in its cost restatement has significant merit. The prior report recognized that a higher level of rates was justified on suspended meat, not because it assumed that *all* suspended meat shipments would weigh over 1,500 pounds less than those in protestants' studies. On the contrary, some shipments would move at higher weights; but, shippers nevertheless would retain the option to move suspended meat at the lower weights. Accordingly, division 2 properly noted in view of the extensive scope of the adjustment that "the rates must cover the cost of service at the lower minimum weight since that is the weight at which the carrier must provide the service," i.e., hold out the service (340 I.C.C. at 299).

On reconsideration, we are satisfied that respondents have carried their burden of proof regarding the alleged expense of loss and damage claims on suspended meat. First, a group of protestants other than the Mayer group used the same loss and damage figures as did the carriers. Second, although the fresh meat category in the Commission's statement contains meats which do not move hanging, the figures were verified by an individual carrier study. Better than 90 percent of the fresh meat traffic studied by the then Burlington Railroad moved in a subcategory which indicates hanging movements. Swift, of whose traffic in these proceedings approximately 75 percent was fresh beef and of which amount 90 percent was shipped hanging, contended that a study of overhead TOFC movements during October 1969, showed a loss and damage figure for suspended meats of almost 3 cents per hundredweight less than the average figure used by the carriers and Swift's figure varied by only a small amount from the corresponding loss and claim amount for boxed meat. Swift, however, premised its computation on only seven claims involving suspended meats and only two involving other than suspended.[12]

[12]the Mayer group of petitioners contend that the carriers' reliance on their loss and damage costs associated with this traffic is not warranted to the extent that such costs are due to the failure of the carriers adequately to maintain their equipment. In our view a higher level of maintenance could just as well be reflected in a showing of even higher costs than the instant ones. In turn, such a showing would underlie even higher proposed rates.

The restatement, which employed the carriers' loss and damage figures, showed that the expense of transporting suspended meat exceeds the expense of handling boxed meat by amounts ranging from 12.3 cents to 16.5 cents per hundredweight for overhead traffic, and ranging from 9.2 cents to 11.6 cents per hundredweight for local western traffic (340 I.C.C. 304-305). Both the 12-cent differential on overhead traffic and the 5-cent differential on local western are supported on this record.

We are not persuaded by the Mayer group that shippers will be unable to load the incentive-oriented minimum weight of 37,000 pounds on boxed traffic in overhead movements, particularly shippers such as Mayer of palletized shipments weighing only 30,000-35,000 pounds. In this connection we note that while in the study of shipments conducted by one group of protestants, boxed meat shipments averaged 36,184 pounds, another study showed an average weight of 37,276 pounds for boxed meat shipments (although some may have moved at now-canceled two-trailer rates at 80,000 pounds). Moreover, both Morrell and Hormel stated that their companies did not have difficulty loading boxed shipments of 38,000 pounds; and the witness for Mayer stated that his only objection to a 38,000 pound minimum was his inability to load palletized, as opposed to nonpalletized, shipments to that weight. While we sympathize with Mayer's problem in this regard, we do not believe that it is sufficient overall to warrant our striking down the minimum weight aspect of the proposal in light of the other evidence of record.[13]

The petitioners also place in issue the rate level to which costs should be compared. The prior report compares costs at the January 1, 1970, rate level. Several of the petitioners allege that the subsequent rate increases in Ex Parte Nos. 265 and 267-A should be taken into account in determining the justness of the rates at issue herein. However, as the division stated in the prior report (340 I.C.C. at 300), the recognition of subsequent rate increases would be inappropriate without a further allowance for cost increases. See also *Increased Freight Rates, 1970 and 1971*, 339 I.C.C. 125 at 235-238.

[13]In passing, we further note that of the total number of the shipments of another of the petitioners, Hormel, probably only 1 percent is palletized.

Discussion and Conclusions

1. *Section 1 issues*

We turn first to whether the proposed rates are just and reasonable under the requirements of section 1(5) of the act. For the most part, the proposed rates are just and reasonable. In some respects, as set forth below, the proposed rates are deficient.

Petitioners allege that the respondents' proposed cancellation of their two-trailer rates is unjust and unreasonable, but no evidence supports this allegation. The cost restatement in the prior report shows that the plan II, local western two-trailer rates do not cover out-of-pocket costs associated with this traffic from most origins except those in Colorado, and others in Oklahoma, Texas, New Mexico, and Nebraska. Significantly, the respondents are canceling their two-trailer rates from all origins, and thus all shippers are being treated equally in having the use of single-trailer rates in the future. In these circumstances, the respondents are under no duty to continue to publish two-trailer rates from certain origins merely because those particular rates happen to be compensatory.

The Mayer group also opposes the carriers' proposal to eliminate the so-called aggregating provision, whereby on the two-trailer shipments to the same consignee the minimum weight of 70,000 pounds can be met by the total weight of the two trailers, regardless of the weight of either of the individual trailers. The cancellation of the aggregating rule follows from the cancellation of the two-trailer rates, and for the same reasons is just and reasonable.

The petitioners have alleged that many of the proposed rates are unreasonably high when compared with the corresponding motor carrier rates on fresh meat. To Chicago, for example, the motor rates, minimum 35,000 pounds, and the proposed plan II rates on suspended meat, minimum 35,000 pounds, respectively, are 60 and 80 cents from Ottumwa, Iowa, 67 and 82 cents from Austin, Minn., $1.39 and $1.43 from Denver, and $1.14 and $2.04 from Fort Worth, Tex. The bare comparison of the proposed rates with motor carrier rates does not persuasively show unreasonable levels, particularly because of the inherent differences in the manner of operation of the two modes of transportation and the absence on this record of the motor carrier costs of operation.

The carriers' proposals can best be considered in terms of the overhead rates, the local western rates, and the local eastern rates. Accordingly, our remaining discussion will be divided along these essentially geographic lines.

Overhead rates.—The railroads propose increases based on distance and their costs of operation. They propose a 5-cent increase on hauls of 1,150 miles or more to major eastern markets by 25-mile blocks. On shorter hauls, the carriers found that the present rates stood at levels below out-of-pocket costs and proposed increases to recover such costs (see 340 I.C.C. at 280). To blunt the sharp increases that would result, however, the carriers also reduced the shorter haul rates per hundredweight by 1 cent per 25-mile block on distances from 1,125 miles down to 800 miles. At distances below 800 miles, the rate level was reduced 1 cent per 50-mile block. Also, as "an accommodation to the meat industry," the carriers, after the section 5a hearing, abandoned their original proposal that mileages be constructed over Chicago, rather than use cross-lake mileages (see, in part, 340 I.C.C. at 222 and 245-246).

At 1,150 miles, the effective rate increase is 11 percent on suspended meat, excluding the new separate charge for origin pickup. For a comparable haul at 1,100 miles, the increase is 15 percent. On boxed meat, the increase is only 3 percent. The percentage increases on suspended meat are less at distances exceeding 1,150 miles, and more at distances under the 1,100 to 1,150 mile bracket.

Excluding the additional pickup charge of $25, some of the larger increases on suspended meat shipments to New York include the following (cents per hundredweight):[14]

From	Present rate	Proposed rate	Percent increase
	cent	*cent*	
Council Bluffs, Iowa	173	206	19.1
Galt, Ill	137	170	24.1
Green Bay, Wis	127	167	31.5
Madison, Wis	132	169	28.0
Milwaukee, Wis	122	166	36.1
Rochelle, Ill	131	168	28.0

Other increases from the above points to Johnstown, Pa., illustrate the shorter hauls and are even higher, such as the following (cents per hundredweight):

[14]Increases or decreases are stated at the Ex Parte No. 259 level.

From	Present rate	Proposed rate	Percent increase
	cent	*cent*	
Council Bluffs, Iowa	139	170	22.3
Galt, Ill	88	159	80.7
Green Bay, Wis	95	160	68.4
Madison, Wis	92	160	73.9
Milwaukee, Wis	81	158	95.1
Rochelle, Ill	80	158	97.5

The carriers seek to justify the much higher increases on the shorter hauls on the grounds that they seek to recover their costs, particularly the relatively high terminal expenses of the shorter haul movements. The rate-to-cost comparisons of the prior report do not show an excessive profit is realized on these hauls. Indeed, one of the higher rate increases (from Green Bay to New York) barely covers the carriers' costs of moving this traffic.[15]

The heavy increases imposed on these shorter hauls are in addition to the separate origin pickup charge of $25. Consequently, some of the carriers' rationale for the much higher increases on the shorter hauls is already fulfilled in the additional pickup charge.

Moreover, shippers like Packerland have relied heavily on rail service; sharp increases like those proposed from Green Bay disrupt rate relationships on which these shippers have relied. We believe such considerations are particularly pertinent here in view of the highly competitive nature of all the origin points with respect to the major eastern markets.

The carriers have proposed increases on suspended meats at varying percentages that depend upon the distance (with adjustments) to major eastern markets, For an average movement, like Ottumwa, Iowa, to New York (about 1,150 miles), the increase is 11 percent; for a competitive point like Cedar Rapids, which is about 1,100 miles from New York, the increase is about 15 percent. In general, the carriers seek a maximum 15-percent rate increase on these average hauls, which increases as distances decline. We believe that no greater increase is warranted on the shorter hauls where the rates will recover variable costs as defined in docket No. 34013, *Rules to Govern Assembling & Presenting Cost Evidence, supra.*

[15]As the prior report shows, the Green Bay-New York haul on suspended meats bring the carriers only 102.6 percent of their out-of-pocket costs, the fifth lowest percentage recovery of costs among all the numerous rate-to-cost comparisons regarding the overhead rates there set forth (340 I.C.C. at 275-78).

We have seen that the carriers propose an increase of 31.5 percent on suspended meat shipments from Green Bay to New York. Excluding the separate origin pickup charge and income taxes, this increased level of rates will return to the carriers about 109 percent of their variable costs associated with this movement at the Ex Parte No. 262 level. If they would limit their increase to bringing them variable costs, the effective rate increase would be about 20 percent;[16] on movements from Green Bay to closer points the percentage rate increases would be higher.

On the one hand, in appropriate circumstances, variable costs are the "minimum level of expenses which must normally be recovered by a carrier in providing particular services" (337 I.C.C. at 326). On the other hand, the cost restatement shows that some of the proposed rates on the long hauls exceed out-of-pocket costs by more than 25 percent, which means that these rates also would be expected to exceed fully allocated costs. Upon more than one occasion, this Commission has held that rates which substantially exceed full costs are not necessarily unreasonably high by reason of that fact alone. See *Commodity Credit Corp.* v. *Texas & P. Ry. Co.*, 306 I.C.C. 525, 533. Yet, the carriers obviously will obtain higher than average profits on the longer hauls offsetting the lower short-haul rates.

We, therefore, find that the overhead rate increase, excluding the separate pickup charge, should not exceed 15 percent of the prior rate or charge unless a higher increase is needed to bring the carriers their variable costs associated with specific movements of suspended meat. This will mean that the carriers should obtain their maximum single-trailer charge on hauls of less than 1,150 miles by taking a 15-percent increase or such higher increase needed to bring the charge to the variable cost level on suspended meats, and by constructing their boxed meat charge at a level 12 cents lower. Nothing set forth in this report should be construed as approving higher increases than those proposed by the carriers.

Local western rates.—The carriers propose increased local western rates and minimum charges based less on distance than on the grouping of origin points. A grouping of origins dates back to the original filing of TOFC rates on meat in 1959. In the grouping of

[16]The out-of-pocket and variable costs are comparable; the primary difference between these costs is that only the former includes an allowance for income taxes. The out-of-pocket costs from Green Bay to New York, excluding income taxes, amount to 162.2 cents per hundredweight, or 27.2 cents more than the present rate. The allowable increase of 27.2 cents between these points equates to an increase of 20 percent over the present rate of 135 cents.

origins, the railroad witnesses state they considered the motor carrier rates as a ceiling and the cost of service as a floor.[17]

The western railroads concede that the full-service plan II local western rates generally exceed the corresponding motor rates. Similarly, when both origin and destination charges are added to the proposed plan II 1/2-overhead rates, a large number of the total charges exceed the corresponding motor carrier charges which include pickup and delivery.

It is not surprising, therefore, that on this record several shippers indicate that the proposed increases in local western and overhead rates, combined with the superior service of the motor carriers, would result in their turning more and more to motor carriage. In several instances the carriers' witnesses conceded that the railroads would lose the traffic if their TOFC rates exceeded the pertinent motor carrier rates and the motor carriers could provide the equipment. Division 2, even while approving the proposed TOFC rates, admonished respondents concerning the diversion they might cause.[18] The respondents made no studies or estimates of the probable dollar effect of the diversion to other modes that might result from the proposed rates. While we recognize that the carriers to some extent in their rate restructuring may be discouraging reliance by meat shippers on rail TOFC service as a primary source of transportation, we discern from the record no overall pattern of deliberate and unreasonable avoidance of carrier duties, particularly in view of the carriers in many instances not meeting their costs under the present rates.

If the railroads establish their rates at too high a level, the movement of traffic may be affected by diversion to motor carriage.[19] On the other hand, if the railroads are required to establish their rates at too low a level, not only could we affect rail profitablity and ability to provide service, but we could also undermine the service advantage of the regulated motor carriers.[20]

[17]As set forth in the prior report (340 I.C.C. at 277), origins west of the Missouri River were grouped together and graded upward from the Omaha or Missouri River rate. The specific points that the carriers propose to include in each group are described more fully in the appendix hereto.

[18]340 I.C.C. at 246. Another facet of the diversion problem involves the cancellation of the two-trailer plan II local western rates. These incentive rates were initiated in 1964 specifically to meet motor carrier competition. The Colorado packers made it quite clear that the carriers' attempt to gain additional revenue through cancellation of these rates would most likely be self-defeating.

[19]See *e.g.*, *Proposed Increased Refrigeration Charges*, 297 I.C.C. 505, 553-54 (1956), sustained *sub nom.*, *Florida Citrus Commission* v. *United States*, 144 F. Supp. 517 (N.D. Fla. 1956), affirmed 352 U.S. 1021 (1957).

[20]For a recent discussion of service advantages, see Goodman, "Recent Trends in Transport Rate Regulation," 70 Mich. L. Rev. 1225 (1972).

We are in general satisfied that the proposed local western rates do not exceed a just and reasonable level. In some instances the proposed local western rates, like certain of the overhead rates, result in very heavy rate increases. For example, the local western charge per trailer on suspended meat from Luverne, Minn., to Chicago will increase from $228 for 300 hundredweight to $326.48 for 350 hundredweight (at the Ex Parte No. 262 level), or an increase of nearly 23 percent; but the variable costs for this movement are even higher.[21] The limitation we have imposed on heavy increases of this type in the overhead rates applies equally as well here.[22]

We note that several proposed local western rates could bring the carriers less than their out-of-pocket expenses (340 I.C.C. at 269-270), and like the rate from Luverne, even less than their variable expenses. Nothing set forth in this report should be construed as approving higher increases than those proposed by the carriers.

Local eastern rates.—Rather than increase local eastern plan II 1/2 rates by large percentages, the railroads have increased the permitted single trailer loading from 35,000 to 38,000 pounds as an incentive to heavier loading. If the shipper treats the new maximum loading as both a minimum as well as a maximum, his effective increase is quite small. For example, the present trailer charge on shipments from Chicago to Philadelphia is $395.80 at the 35,000 pound minimum, or 113 cents per hundredweight. Under the proposed rates, the trailer charge is $443.08 (at the Ex Parte No. 262 level), but the permitted loading is now 38,000 pounds. If the shipper loads to the maximum, the proposed rate is but 117 cents per hundredweight, or only a 4-cent increase over the prior rate. The effective increase per trailer is only $13.38 for a 38,000 pound load, or an increase of about 3 percent over the present charge.

Similarly, the present trailer charge on shipments from East St. Louis, Ill., to Baltimore is $421.27 for a 35,000 pound minimum shipment, or 120 cents per hundredweight. The proposed effective increase in the trailer charge is $14.53 for a 38,000 pound shipment or $471.70. If the shipper loads 38,000 pounds, his rate increase is but 4 cents per hundredweight or, again, about 3 percent higher than the present charge. In certain instances the proposed rates are below out-of-pocket costs; where they exceed such costs, they do so only by a small margin.

[21]We estimate that the region V line-haul cost per hundredweight mile is 0.0623 cents on suspended meats and that the terminal cost per hundredweight is 67.8 cents. For the Luverne haul of 500 miles, the variable cost is about 99 cents per hundredweight.

[22]It should be noted, however, that the rates on the other than suspended meats will be 5 cents lower than the rates on suspended meats in local western movements.

We find that the proposed increases in the local eastern rates and charges are just and reasonable.

II. *Section 3 issues*

The main thrust of the opposition to the proposed rates is aimed at inequalities in the proposed rate structure which it is alleged will unduly prefer or prejudice either certain origins or destinations and disrupt existing rate relationships.

To warrant a finding of undue preference and prejudice under section 3(1), the evidence must disclose, (1) that a difference in the level of the rates exists in favor of the preferred points, (2) that the difference in rates is not justified by transportation conditions, (3) that the prejudiced party or parties will suffer actual or potential injury, and (4) that there is a carrier or group of carriers which is the common source of the rate prejudice and which effectively participates in both the prejudiced traffic and preferred traffic. See *Fresh Meats, Ill., Ind., Ky., Ohio & Mo. to Points in Fla.*, 318 I.C.C. 5, 10.

In several cases, the Commission has employed the relation of rates to the docket No. 28300 first-class rates to determine whether undue preference and prejudice exists, *e.g.*, *Cudahy Packing Co.* v. *Akron, C. & Y. R. Co.*, 318 I.C.C. 229.

But as Circuit Judge Friendly has reminded us,

> the Commission has never adopted a doctrinaire position that any failure to bring rail charges into exact accord with differences in distance is a preference or prejudice, much less an undue one.[23]

A class-rate structure is available to determine a proper basic relationship among rates (318 I.C.C. at 245); but it is not compulsory, nor is it appropriate here, as this record shows.

Here again we believe it will be helpful to an understanding of the problems presented if we consider the separate issues regarding the overhead and the local western rates. No further issue of preference and prejudice involves the local eastern rates.

Overhead rates.—The carriers gave primary consideration to distance and costs in proposing a revision of the overhead rates. In so doing, they preserved the primary distance relationships among the overhead rates. If we resorted to the docket No. 28300 first-class rates as a basis for testing the overhead rates, we would only encounter anomalies that such a scale could not cure. For example,

[23] *New York Central R. Co. v. United States*, 207 F. Supp. 483, 490 (S.D.N.Y. 1962).

the Denver rates to New York and Boston may be compared to either the Dubuque or the Omaha percentage of first class:

From	To New York	To Boston
Denver, Colo.:		
Mileage	1,887	1,974
Class-100 boxcar rate	855	881
Boxed meat rate	280	292
Percent of class 100	33	33
Dubuque, Iowa:		
Mileage	1,061	1,133
Class-100 boxcar rate	587	611
Boxed meat rate	171	174
Percent of class 100	29	28
Omaha, Nebr.:		
Mileage	1,358	1,448
Class-100 boxcar rate	684	709
Boxed meat rate	206	215
Percent of class 100	30	30

Our taking either Dubuque or Omaha as a basis for the overhead rate structure results in reducing the Denver rate to reflect a range of 28 to 30 percent of first class, when the complaint of certain shippers on this record is that Denver is already preferred. In any event, our solutions under the section 1 discussion adequately deal with the more severe increases in these rates and ameliorates the major objection to these rates under section 3.[24]

The meatpackers at Chicago, however, raise an issue of destination preference and prejudice. They point out that many shippers at Chicago compete with shippers at various eastern cities, especially New York, in selling processed meats to many points in official territory. The Chicago meatpackers compare the proposed rates from midwestern and southwestern origins to Chicago, on the one hand, and to various points beyond Chicago, on the other, and contend that these rates unduly prejudice Chicago and unduly prefer the various eastern destinations.

[24] There is no merit to the contention of the Mayer group that a section 3 violation occurs because of the much higher increases which they would pay under the proposed plan III/2 overhead rates involving joint-line service versus the considerably lower increases which their competitors would incur under the plan III/2 local eastern rates involving single-line service. The local eastern rates are on a substantially lower level than the overhead ones for two main reasons. First, the local eastern rates do not have to cover the interterritorial expense of interchange at Chicago or St. Louis. Secondly, as opposed to the formula concerning the overhead rates, the final local eastern rate proposal did not involve a differential for the carriage of suspended meats. The amount of the proposed local eastern increase was effectively limited (footnote continued on next page)

Although as a rule we have not considered the nontransportation circumstances under section 3 in determining whether like circumstances exist,[25] we must on occasion consider nontransportation factors in determining whether prejudice in fact arises.[26] We find from this record that the potential difficulties of the Chicago packers will result, not from the carriers' rates, present or proposed, but from the pricing system of their suppliers.

The Chicago packers purchase on a delivered basis. The basing point which the *Daily Provisioner* uses was moved from Chicago to the Missouri River, and quotes at $1 over the river price for delivery to Chicago and $2.50 over for delivery to New York. This means that meat at $50 per hundredweight in Omaha would be $51 to Chicago and $52.50 to New York. When a representative of the Chicago producers cryptically testified that suppliers prefer to sell in New York "because more of the rate to New York could be recovered in the *Provisioner* price basis," he was merely saying that the *Provisioner overstated* the transportation cost and allowed the shipper a greater profit when he shipped to New York than when he shipped to Chicago.

As shown in the prior report, the present Omaha-Chicago rate per trailer on suspended meat is $248.39 (minimum 300 hundredweight), or 82.8 cents per hundredweight (at the Ex Parte No. 262 level). The proposed rate is $319.06 (minimum 350 hundredweight) or 91.2 cents per hundredweight. If the Omaha shipper chose to deliver to Chicago under the *Provisioner* price, he would retain 17.2 cents from the allowed $1 transportation add-on to the price, or 8.8 cents under the proposed rates. The shipper does much better if he ships to New York, for under the present rate of $693 or $1.98 per hundredweight, or under the proposed rate of $764.26 or $2.18 per hundredweight, the shipper retains 52 cents and 32 cents, respectively; if we subtract 13 cents for cartage, the shipper retains 39 cents or 19 cents, in either event substantially more than if he shipped to Chicago. If the meat-pricing mechanism included the true transportation cost, whether the present or the proposed rates

(footnote 24 continued)
through the adoption of an increase in the permitted loading from 35,000 to 38,000 pounds, as noted elsewhere in this report. Since the transportation conditions regarding the prejudiced and preferred points are not substantially similar, undue preference and prejudice does not exist, and there is no section 3 violation. *Atchison, Topeka and Santa Fe Railway Co.* v. *United States*, 218 F. Supp. 359, 366 (N.D. Ill. 1963).

[25] See *United States* v. *Illinois Central R.R.*, 263 U.S. 515, 524 (1924); *Transcontinental Bus System, Inc.* v. *C.A.B.*, 383 F. 2d 466 (C.A. 5, 1967), cert. denied, 390 U.S. 920 (1968).

[26] *Texas & Pacific Ry.* v. *Interstate Commerce Commission*, 162 U.S. 197 (1896).

were in effect, the Chicago producers would not suffer the disadvantage of which they now complain. Accordingly, their disadvantage is one we are powerless to remedy and, indeed, appears to be beyond the scope of this proceeding.

Local western rates.—As set forth in the prior report (340 I.C.C. at 227), the carriers have structured the local western rates into 13 different origin groups (all points within the groups taking the same rates), and additional individual point-to-point rates. In addition, the rates charged from group to group taper with distance with the shorter-haul groups bearing higher charges per mile than the longer-haul groups.

The carriers defend the proposed structure on the basis of the *City of Wilmington*[27] principle that recognizes the reasonableness of a 25-percent maximum difference in distances between equalized groups. We believe that the *Wilmington* principle has application to the issues presented in this proceeding; but we also believe the carriers, and the prior decision (at 243) have not fully recognized its relevance to this proceeding.

At the outset we have the questions whether any grouping of points is justified or whether we should adhere to a strict distance scale for all origin points. Figure No. 2 on the following page shows that the proposed origin groups do not strictly adhere to distance; in fact, in some instances the minimum charge is higher for lesser distance. We believe, and shall more fully explain below, that analogous with the trend of our port cases, we should not require the carriers here to adhere to any formula based on rigid adherence to distance.

In *Cudahy Packing Co.* v. *Akron, C.&Y.R.Co., supra*, the railroad failed to show that competitive circumstances at and east of the Mississippi River justified the higher rates, distance considered, they had accorded to shipping points west of that river on shipments of meat to eastern destinations. The Commission prescribed a uniform relationship of the rates from origins west of the river to the east based on the ratio of the rates from Dubuque, Iowa, to the docket No. 28300 first-class rates to the same destinations.[28]

In *Sterling Colo. Beef Co.* v. *Atchison, T. & S. F. Ry. Co.*, 339 I.C.C. 530, division 2 removed Sterling, Colo., from the carriers'

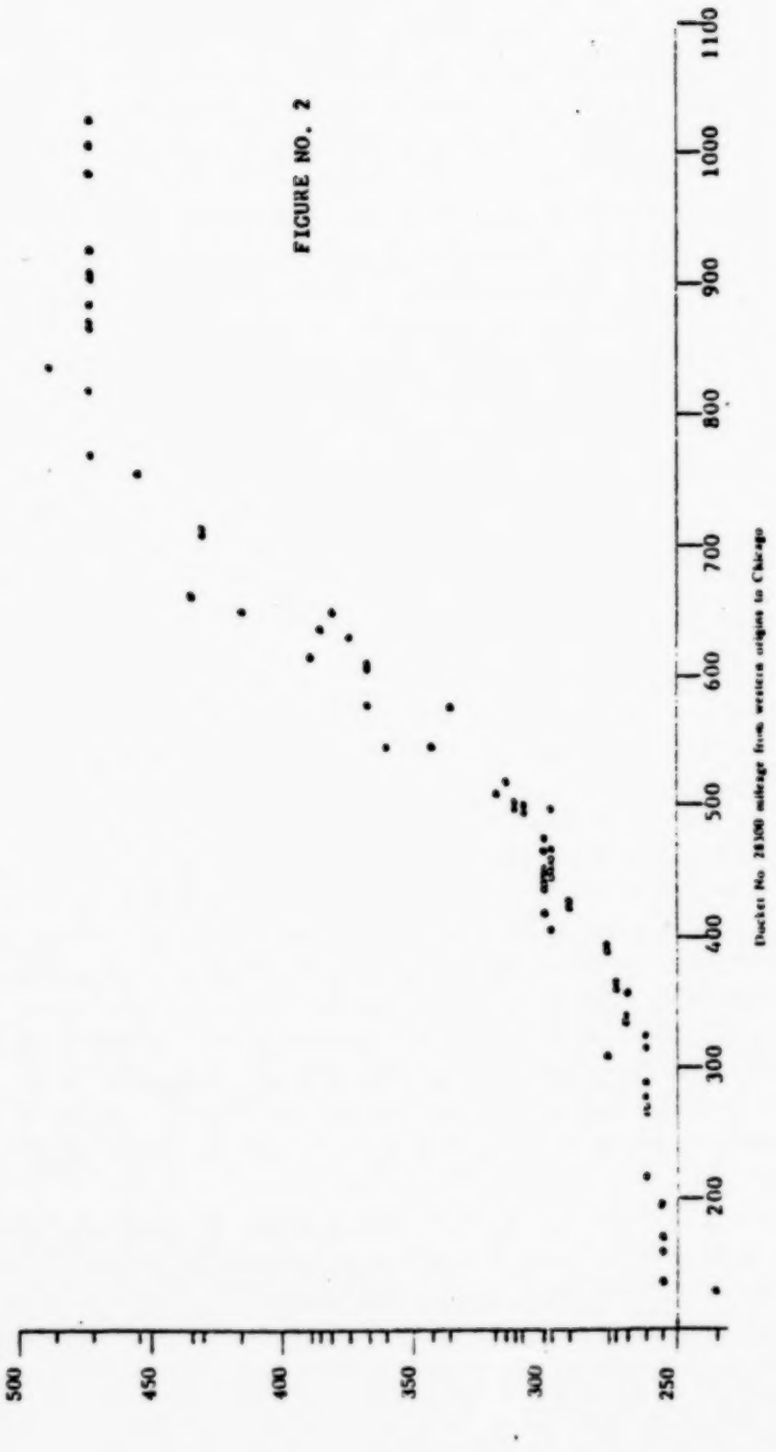
[27] *City of Wilmington* v. *Alabama G.S.R. Co.*, 316 I.C.C. 709, 319 I.C.C. 620.

[28] This order requiring removal of the prejudice to points west of the Mississippi River was sustained in *Atchison, T. & S. F. Ry. Co.* v. *United States*, 218 F. Supp. 359 (N.D. Ill. 1963). The court sustained the Commission's finding that the difference in degree of motor competition as between the area west of the river and that on and east of the river did not justify the higher rates from the former points.

grouping of that point with Denver, Greeley, and Pueblo, to give it the benefit of its shorter distance to Chicago. The division found that the establishment of a group basis for the rates from Sterling to Chicago was not justified when other rates were established on a docket No. 28300 mileage basis from points in the Colorado origin area to destinations other than Chicago.

FIGURE NO. 2

RELATIONSHIP OF WESTERN ORIGINS RESULTING FROM PROPOSED LOCAL WESTERN ORIGIN GROUPS



In the present proceeding, the railroads have moved their basing point from Dubuque to the Missouri River, thereby according Omaha, the major complainant city in the *Cudahy* proceeding, equal or better treatment than points to the east of the Missouri. Moreover, unlike *Cudahy*, the carriers here seek to recoup their costs. Unlike *Sterling*, the present proceeding involves a very broad adjustment of the rates; nevertheless, the result reached in this proceeding likewise leaves Sterling in a reasonable relation with all other points.[29]

Virtually at the same time that we were deciding *Cudahy*, we ruled in a series of cases involving competition among the Nation's ports that we would not strictly adhere to the distance principle.[30] Yet, even in the face of a strong congressional policy favoring competition among the ports, the Commission stated that competition would be required within "reasonable limits," which translated into a requirement of equal rate treatment of a port from points that were no more than 25 percent more distant from another and closer port.[31]

Shippers in our view are not entitled under the act to have competitive rail rates at all points. Specifically, we will not prescribe a distance-oriented schedule of rail rates to compete with prevailing motor carrier rates where (1) the railroads are not obtaining their variable costs from the service, (2) shippers of meat have relied more and more on motor carrier service, and (3) the motor carriers have a distinct service advantage. We consider a greater discretion to adjust rates particularly important for the carriers in situations like those present here where the increases involved will not return excessive profits to the carriers.

In the future, the railroads may move less traffic than they have in the past. Because of the inherent service advantages enjoyed by motor carriers, it may not be in the interest of some shippers or some railroads to continue rail meat traffic at the same volume as in past years.

On the other hand, from the standpoint of affected shippers and communities there is a point at which the grouping of cities and areas deprives them of natural advantages and becomes not merely

[29]The single-trailer rates in that proceeding became effective and the two-trailer rates have remained in abeyance. Our findings herein moot the two-trailer controversy.

[30]See *City of Wilmington* v. *Alabama G.S.R. Co.*, 316 I.C.C. 709 (1962); *Iron Ore From Eastern Ports to C.F.A. Points*, 321 I.C.C. 473 (1964). The proceedings before this Commission and in court are described in Goodman, "Recent Trends in Transport Rate Regulation," supra, at 1245-1249 (1972).

[31]*City of Wilmington*, *supra*, 316 I.C.C. at 725-726.

prejudicial, but unduly prejudicial in violation of the act. The standard we have employed in the *City of Wilmington* case and will adapt to the present proceeding, we believe, accords the carriers a reasonable flexibility to define the rate structure without depriving shippers and communities of natural advantages nor subjecting them to undue prejudice.

In the port cases, we have attempted to develop guidelines for requiring the railroads to permit competition among the Nation's ports. We believe these precedents provide a useful guideline for the present proceeding. By adopting a maximum limitation on the grouping of points, rather than a distance scale, all shippers and localities are treated fairly, and yet the railroads gain a freer hand to adjust rates in response to competition. The limitation on the proposed groupings that we will adopt is perhaps best described in terms of its effect on a single group.

A representative origin grouping that is proposed includes Denver, Colo.; each of the origins grouped with Denver takes the minimum charge of $472.50 at the Ex Parte No. 259 level under the proposed local western rates governing shipments to Chicago. The grouped origins include the following:

Origin	Docket No. 28300 mileage
Dodge City, Kans	770
Garden City, Kans	820
Rapid City, S. Dak	868
Sidney, Nebr	868
Sterling, Colo	883
Gering, Nebr	905
Scottsbluff, Nebr	905
Fort Morgan, Colo	924
Greeley Junction, Colo	982
Denver, Colo	1006
Pueblo, Colo	1024

The carriers assume that the grouping is reasonable, since, (1) Dodge City does not exceed 25 percent of the distance to Chicago of the next prior origin point (McCook, Nebr., which is 754 miles from Chicago), and (2) each of the points grouped with Dodge City does not exceed 25 percent of the distance to Chicago of the so-called "group key point" chosen by the carriers, which for this group is Scottsbluff. We do not believe the "group key point" principle is applicable here.

The grouping of Dodge City with more distance points like Denver and Pueblo results in equal rates from points that are 31 to 33 percent further from Chicago than the closest point in the group. Other relationships between highly competitive points in other groups are even more strained; for example, Cedar Rapids is grouped with Mason City, although the latter is 48 percent further distant from Chicago than the former.

The carriers urge that their adjustment is consistent with the *City of Wilmington* decision because "none of the differences in grouping distances on the western local rates exceed the Commission prescribed maximum. Ostensibly, they *begin* each grouping with a point that is within 25 percent of the distance to Chicago in comparison to the greatest distance in the preceding group. Their method fails to give sufficient weight to the intensity of the competition among the points within the group.

We believe the railroads should permit greater competition within the groups by regrouping any local western origin point that is more than 25 percent farther from the respective destination than the closest point within the group, based on the short-line distance. The application of the *City of Wilmington* principle we have here adopted will require only a few changes in the proposed local western rate structure; but the changes will remove the more serious misalignments of rates.

For example, such 25-percent formula will require the removal of Green Bay, Wis., from the Clinton, Iowa, group. The 25-percent rule will also require a division of the Cedar Rapids, Iowa, group into at least two subgroups, including:

Subgroup A	Subgroup B
Cedar Rapids, Iowa	Iowa Falls, Iowa
Ottumwa, Iowa	Marshalltown, Iowa
Waterloo, Iowa	Mason City, Iowa
	Postville, Iowa

Subgroup A should be accorded a lower minimum charge than subgroup B, but they should not be restructured at a substantially higher rate level. The rule will also require the removal of all points except Denver, Greeley Junction, and Pueblo from the Denver group; the other points should be grouped with the next preceding group (McCook, Nebr.). In this way competitive origin points within each group will be accorded rates that give more weight to their distance

advantage without depriving the carriers of a fair opportunity to restructure their heretofore depressed rates.

We note that certain individual origin points under the proposed groups will be accorded higher rates and minimum charges to Chicago than from points in preceding groups that are more distant from Chicago. As shown in appendix A hereto, Eau Claire, Wis., for example, is assigned a minimum charge of $276.50 by the carriers although it is closer to Chicago than Fort Dodge, Iowa, which is assigned a lower charge. Most of the allegedly prejudiced points like Eau Claire, however, are being accorded rates and charges per trailer-mile of 63 cents or less that are comparable to the rates and charges per mile of competing points. The allegedly prejudiced points are set forth below:

Comparison of group points taking higher rates and charges to Chicago than from more distant origins

Affected origin under carriers' proposal	Docket No. 28300 miles from Chicago	Proposed minimum charge	Proposed minimum charge per trailer-mile
(1)	(2)	(3)	(col. 3 ÷ 2)
			Cent
Eau Claire, Wis	309	$276.50	89
Storm Lake, Iowa	406	297.50	73
Oakland, Iowa, through Omaha	418-476	301.00	72-63
Hawarden, Iowa	497	308.00	62
West Point, Nebr	509	318.50	63
Schuyler, Nebr	545	343.00	63
Emporia, Kans	544	360.50	66
Wichita, Kans	636	385.00	61
Huron, S. Dak	617	388.50	63
Minden, Nebr	649	416.50	64
Arkansas City, Kans	661	434.00	66
Liberal, Kans	838	486.50	58

As shown above, except for Eau Claire, Storm Lake, the Oakland group, Emporia, Minden, and Arkansas City, the carriers' proposed minimums do not exceed 63 cents per trailer-mile (docket No. 28300 mileage). In our view, the rates and charges on shipments from the points set forth above should not exceed 63 cents per trailer-mile, at the Ex Parte No. 259 level, except as is necessary for the recovery of variable costs on suspended meats computed on the basis of data of record, but in no case higher than proposed.

The Mayer group contends that the carriers unduly prefer Denver to the detriment of other local western origins on shipments to Chicago. They show that the present charge on suspended meat of 146 cents for a 35,000 pound shipment is to be replaced by 143 cents from Denver, whereas other points will experience substantial increases. The Mayer argument applies, however, only on the 35,000-pound loads; for heavier loads, such as at 38,000 pounds, Denver will lose an incentive rate of 139 cents. Consequently, Denver will, like other local western origins, experience an increase, i.e., from 139 to 143 cents, and will not be unduly preferred.

III. *Section 4 issues*

Petitioners Mayer, Morrell, Rath, and Hormel allege that a section 4 violation occurs as a result of the circumstance that from certain origins in western trunkline and southwestern territories to certain official territory destinations the combination of the plan II local western rates to Chicago and the plan III/2 local eastern rates from Chicago is less than the equivalent single-factor overhead rates when the consignor requests the optional pickup service at origin, in which case exactly the same service is being performed by the railroad under either alternative.[32] These petitioners argue that the section 4 violation occurs with regard to shipments of boxed as well as suspended meats.

Respondents premise their denial of such a violation of section 4 upon the proposed provision in their tariffs which is intended to prevent the use by shippers of a combination of the two local rates so as to displace the higher overhead rate. This tariff provision is said to be a reflection of the axiom that there can be no violation of section 4 unless the transportation services rendered under both the combination of locals and the joint rate are similar. Here, it is contended, there is no such similarity, since the combination of locals would provide for pickup by the railroads at the western or southwestern territory origins, whereas the joint plan III/2 overhead rate does not so provide.

However, the carriers ignore the fact, noted by protestants, that their own proposal for the plan III/2 overhead rates embodies the provision that at the consignor's request the carrier will also

[32]A diagram illustrating the combination rates and the overhead rate is set forth in figure No. 1, supra.

provide the pickup (for an additional charge, 340 I.C.C. at 217), thereby in effect converting the overhead service into a plan III/4. Such a service would be the same as that provided under a combination of the local western plan II rates and the local eastern plan III/2. Since in these circumstances the overhead rate exceeds the combination of the locals, we find that the overhead proposal in Sub-No. 3 is not shown to be in conformity with section 4 of the act.[33]

Some of the rates departing from compliance with section 4 obviously will be affected by other findings we have made under sections 1 and 3. To the extent such findings do not eliminate the fourth section departures, the carriers must remedy the unlawfulness.

Moreover, our further analysis of petitioners' data reveals that in the examples given for movements of suspended meat, even when the optional pickup charge is not added to the overhead rates, said overhead rates from Denver, Scottsbluff, Fremont, Sioux City, and Omaha, respectively, to New York City exceed the corresponding combination of locals. Under the same circumstances regarding movements of boxed meat, the overhead rates alone from Denver and Scottsbluff, respectively, to New York City would still be greater than the corresponding combination of locals. Concerning these examples, the carriers technically might be correct in their argument that in view of the dissimilarity of services offered there could be no section 4 violation. Notwithstanding, the cited examples, as proposed by the carriers, portray the anomalous circumstance that less service would be provided under the overhead rate than under the combination of locals and at a higher price. To whatever extent such or apparently similar anomalies will remain in the proposal after compliance with prior findings, we find them not shown to be just and reasonable in compliance with section 1(5) of the act, and we further find respondents' proposed tariff provision purporting to prevent the use of the combination of locals unlawful to the same extent not shown to be lawful.

Our conclusion that the respondents have not justified the proposed schedules is without prejudice to the filing of new schedules on 30 days' notice. In publishing such schedules, the carriers should comply, to the extent applicable, with the provisions of section 4 and 6 of the Interstate Commerce Act.

[33]Indeed, the carriers admitted that in determining the level of the overhead rates, they were aware of, but did not give controlling effect to, the level of the combination of the locals. In *Moore Bros.* v. *Chicago, B. & Q. R. Co.*, 210 I.C.C. 95, 98 (1935), the Commission stated, "The carriers cannot avoid the law by mere words purporting to provide that a local rate may not be used in combination with other lawful rates."

ULTIMATE FINDINGS

Based on the subsidiary findings reached herein, we find:

1. The proposed overhead rates are not shown to be just and reasonable to the extent that they exceed the prior rates by more than 15 percent, except as is necessary for the recovery of variable costs on suspended meats computed on the basis of data of record, but in no case higher than proposed; that the proposed local western rates are not shown to be just and reasonable to the same extent set forth above, and to the extent that points within groups are more than 25 percent distant from the destinations than the closest point in the group; and that the local western rates from Eau Claire, Wis., Storm Lake, Iowa, the Oakland, Iowa group, Minden, Nebr., and Emporia and Arkansas City, Kans., should be accorded minimum charges not in excess of 63 cents per trailer-mile, except as is necessary for the recovery of variable costs on suspended meats computed on the basis of data of record, but in no case higher than proposed;

2. The proposed local eastern rates and the proposed cancellation of the two-trailer rates are just and reasonable;

3. The proposed plan V overhead rates are not shown to be just and reasonable;

4. It appears also that certain rates would create departures from the provisions of section 4 of the act, for which no relief has been sought; and, some, for related reasons, are not shown to be just and reasonable;

5. The proposed restriction intended against the use of the combination of the local eastern and local western rates to form a through rate is not shown to be just and reasonable.

Finally, we find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

COMMISSIONER HARDIN, whom COMMISSIONER GRESHAM joins, dissenting:

I would affirm the prior report and order, 340 I.C.C. 214, wherein division 2 found just and reasonable those rates that the majority would now order canceled.

This proceeding, involving a proposed restructuring of TOFC meat rates, must be viewed as a cost case. Although the majority has

resolved each disputed cost factor in favor of the carriers, the majority nevertheless proceeds to find the contested rates not shown to be just and reasonable. This finding is difficult to understand. Unstated by the majority is what additional cost evidence the carriers should have introduced that would have supported either a finding that the rates in issue were just and reasonable or unjust and unreasonable.

If the majority is of the view that the cost evidence of record is deficient, then one can only speculate as to why the carriers are told to construct a scale of rates based on the "data of record."

> The proposed overhead rates are not shown to be just and reasonable to the extent that they exceed the prior rates by more than 15 percent, except as is necessary for the recovery of variable costs on suspended meats computed on the basis of *data of record*, but in no case higher than proposed; that the proposed local western rates are not shown to be just and reasonable to the same extent set forth above. [Emphasis supplied.]

Having permitted increases no higher than "15 percent, except as is necessary for the recovery of variable costs on suspended meats," I must assume that the majority has found the present rates noncompensatory based on the cost evidence of record, and that a 15-percent increase has been justified on this record.

The majority analysis of the evidence of record is confusing in another respect. The majority would permit certain rates allegedly not shown to be just and reasonable to be increased by 15 percent above present rates. Some of these rates held eligible for a 15-percent increase can be further increased so as to equal variable costs. However, with respect to other rates, shown on the cost restatement attached to the division 2 decision to be below variable cost, the carriers are prohibited from increasing them to the variable cost level. No reason is advance for requiring carriers to maintain rates below cost, and no reason is apparent for requiring what may be an unconstitutional result.

The characterization of this proceeding as a cost case does not make unnecessary the consideration of allegations of preference and prejudice. I agree with the views expressed in the prior division 2 report and preference and prejudice has not been established. However, the majority of the Commission has now affirmatively concluded that the proposal in issue does result in preference and prejudice situations. To correct these alleged violations, the majority has prescribed a novel "grouping" approach. The prescribed formula may and probably will result in as many allegations

of preference and prejudice as was engendered by the initial proposal of the carriers. If actual preference and prejudice results from the carriers publishing the prescribed "groupings," the majority action has apparently denied shippers any possibility of redress through reparations, or otherwise, as the carriers can defend on the basis that the Commission ordered and, therefore, intended the complained about result.

The majority decision marks the first time, to my knowledge, that this Commission, when considering a rate restructuring proposal, has required the reduction of certain rates while, at the same time, prohibiting other rates, part of the same proposal, from being increased to variable cost levels. Is this holding limited to the facts of record or will the majority adhere to this position in future rate restructuring proceedings? The question also arises as to whether the majority decision, though couched in terms of "not shown to be just and reasonable," stands for the proposition that any rate that exceeds fully allocated costs is unjust and unreasonable. Stated differently, does the majority decision equate maximum rates with fully allocated costs? Although the future significance of this proceeding as a precedent is speculative, the majority decision appears, perhaps unintentionally, to have cast a cloud over the zone of reasonableness concept.

COMMISSIONERS WIGGIN and MONTEJANO did not participate.

It is ordered, That the respondents herein be, and they are hereby, notified and required to cancel, on or before the expiration of 30 days from the date of service of this report and order, to the extent found not shown lawful herein, the schedules described in the orders entered on April 8, April 13, and May 26, 1970, by the Commission's Board of Suspension, upon not less than 1l day's notice to this Commission and to the general public by filing and posting in the manner prescribed under section 6 of the Interstate Commerce Act, without prejudice to the publication of new rates and charges in conformity with the views expressed herein.

And it is further ordered, That these proceedings be, and they are hereby, discontinued.

By the Commission.

ROBERT L. OSWALD,
Secretary.

(SEAL)

APPENDIX

Proposed local western origin groupings to Chicago, Ill. (rates in cents per 100 pounds and minimum charges in dollars at the Ex Parte No. 259 level)

Origin	Boxed meat rate	Suspended meat rate	Minimum charge	ICC docket No. 28300 mileage	Proposed ICC docket No. 28300 group key point if other than origin point
Madison, Wis	62	67	234.50	130	———
Clinton, Iowa	68	73	255.50	138	———
Davenport, Iowa	68	73	255.50	161	———
Dubuque, Iowa	68	73	255.50	172	———
Green Bay, Wis	68	73	255.50	197	———
Cedar Rapids, Iowa	70	75	262.50	219	———
Iowa Falls, Iowa	70	75	262.50	315	———
Marshalltown, Iowa	70	75	262.50	289	———
Mason City, Iowa	70	75	262.50	325	———
Ottumwa, Iowa	70	75	262.50	270	———
Postville, Iowa	70	75	262.50	276	Decorah
Waterloo, Iowa	70	75	262.50	265	———
Albert Lea, Minn	72	77	269.50	356	———
Austin, Minn	72	77	269.50	337	———
Des Moines, Iowa	72	77	269.50	337	———
Fort Dodge, Iowa	73	78	273.00	364	———
Perry, Iowa	73	78	273.00	359	Grand Junction
Eau Claire, Wis	74	79	276.50	309	———
Minneapolis, Minn	74	79	276.50	395	———
St. Paul, Minn	74	79	276.50	395	Minneapolis
Estherville, Iowa	78	83	290.50	423	———
Spencer, Iowa	78	83	290.50	425	———
Cherokee, Iowa	80	85	297.50	450	———
Denison, Iowa	80	85	297.50	454	Mapleton
Hospers, Iowa	80	85	297.50	461	Sheldon
Le Mars, Iowa	80	85	297.50	450	Cherokee
Sioux City, Iowa	80	85	297.50	498	———
Storm Lake, Iowa	80	85	297.50	406	Sac City
Worthington, Minn	80	85	297.50	467	———
Glenwood, Iowa	81	86	301.00	452	Shenandoah
Harlan, Iowa	81	86	301.00	446	Woodbine
Kansas City, Mo	81	86	301.00	437	———
Oakland, Iowa	81	86	301.00	418	Atlantic
Omaha, Nebr	81	86	301.00	476	———
Phelps, Mo	81	86	301.00	464	Tarkio
St. Joseph, Mo	81	86	301.00	439	———
Windom, Minn	81	86	301.00	441	St. James
Hawarden, Iowa	83	88	308.00	497	———
Luverne, Minn	83	88	308.00	500	———
Fremont, Nebr	84	89	311.50	500	———
Wahpeo, Nebr	84	89	311.50	500	Fremont
Sioux Falls, S. Dak	85	90	315.00	519	———

Proposed local western origin groupings to Chicago, Ill. (rates in cents per 100 pounds and minimum charges in dollars at the Ex Parte No. 259 level)—Continued

Origin	Boxed meat rate	Suspended meat rate	Minimum charge	ICC docket No. 28300 mileage	Proposed ICC docket No. 28300 group key point if other than origin point
West Point, Nebr	86	91	318.50	509	Oakland
Norfolk, Nebr	91	96	336.00	574	———
Schuyler, Nebr	93	98	343.00	545	Columbus
Emporia, Kans	98	103	360.50	544	———
Grand Island, Nebr	100	105	367.50	607	———
Hastings, Nebr	100	105	367.50	607	Grand Island
York, Nebr	100	105	367.50	577	———
West Fargo, N. Dak	102	107	374.50	631	Fargo
Mankato, Kans	104	109	381.50	649	———
Wichita, Kans	105	110	385.00	636	———
Huron, S. Dak	106	111	388.50	617	———
Minden, Nebr	114	119	416.50	649	Kearney
Darr, Nebr	118	123	430.50	709	Gothenburg
Lexington, Nebr	118	123	430.50	709	Gothenburg
Arkansas City, Kans	119	124	434.00	661	———
McCook, Nebr	125	130	455.00	754	———
Denver, Colo	130	135	472.50	1,006	———
Dodge City, Kans	130	135	472.50	770	———
Fort Morgan, Colo	130	135	472.50	924	———
Gering, Nebr	130	135	472.50	905	Scottsbluff
Greeley Junction, Colo	130	135	472.50	982	———
Pueblo, Colo	130	135	472.50	1,024	———
Rapid City, S. Dak	130	135	472.50	868	———
Scottsbluff, Nebr	130	135	472.50	905	———
Sidney, Nebr	130	135	472.50	868	———
Sterling, Colo	130	135	472.50	883	———
Garden City, Kans	130	135	472.50	820	———
Liberal, Kans	134	139	486.50	838	———

INTERSTATE COMMERCE COMMISSION

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 16th day of November, 1973.

INVESTIGATION AND SUSPENSION DOCKET No. 8536
(Sub-No. 1)[1]

MEAT & PHP, TOFC, SWL, WTL OFFICIAL TERRITORIES

It appearing, That on February 27, 1973, the Commission's report and order on reconsideration in these proceedings was served;

It further appearing, That by petition filed March 16, 1973, the respondents operating in western trunkline territory request clarification of the report and order in the following respects: (1) whether ultimate finding number 1 requires respondents to re-group the origin points in the manner exemplified at page 34 of the report, or whether they may use their own discretion, while nevertheless otherwise complying with the finding, and (2) whether, in complying with ultimate finding number 1, respondents must calculate costs on the out-of-pocket or variable cost levels; and that a reply thereto was filed on April 3, 1973, by certain protestants;

Wherefore, and good cause appearing therefor:

It is ordered, That the petition for clarification be, and it is hereby, granted to the extent hereinafter indicated.

It is further ordered, That, by way of interpretation, ultimate finding number 1 does not require the re-grouping of origin points in the precise manner exemplified in the

[1] This order embraces also I&S Docket No. 8536 (Sub-No. 2, Meat and PHP, TOFC, Southwestern-Western Trunk Line Terrs.; and I&S Docket No. 8536 (Sub-No. 3), Meats and PHP, West and Southwest to the East.

body of the report, except that Sterling, Colo., must be included in a lower-rated group than Denver, Greeley, and Pueblo, Colo., to comport with the tenor of the result in *Sterling Colorado Beef Co.* v. *Atchison, T. & S. F. Ry. Co.*, 339 I.C.C. 530; that the respondent otherwise may use their discretion in re-grouping, so long as they comply with the 25-percent distance criterion and the other requirements of the findings; and that the term "variable costs" appearing in finding number 1 of the report on reconsideration refers to costs as so defined in *Rules to Govern the Assembling & Presenting of Cost Evidence*, 337 I.C.C. 298.

It is further ordered, that the order served in these proceedings on February 27, 1973, which order, was stayed by order entered on March 26, 1973, pending disposition of the petition for clarification be, and it is hereby, reinstated to become effective on or before 30 days from the date of service of this order.

This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

By the Commission.

ROBERT L. OSWALD,
Secretary.

(Seal)

INTERSTATE COMMERCE COMMISSION

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 21st day of August, 1974.

INVESTIGATION AND SUSPENSION DOCKET NO. 8536 (SUB NO. 1)[1] MEAT & PHP, TOFC, SWL, WTL, OFFICIAL TERRITORIES

Upon consideration of the record herein, including the report and order on reconsideration, 344 I.C.C. 299, and of the order of November 16, 1973, interpreting and modifying the prior order; of the petition for further consideration filed on May 7, 1974, by a protestant, Sterling Colorado Beef Company; and of the reply filed thereto by the railroad respondents; and

It appearing, That, pursuant to the interpretation order, the respondents herein published local western rates of $1.87 from the Denver, Colo., rate group, and $1.86 from the Sterling, Colo., rate group on single-trailer shipments to Chicago, Ill., which became effective on December 26, 1973, without protest; and that petitioner claims that such grouping is in violation of outstanding orders;

It further appearing, That the petitioner again objects to the overhead rates to destinations in official territory, and to the relationships of two-trailer rates to Chicago on traffic destined to eastern points as being contrary to the findings in *Sterling Colorado Beef Co.* v. *Atchison, T. & S. F. Ry. Co.*, 339 I.C.C. 530 (*Sterling* case);

It further appearing, That, while there is merit to the first argument regarding the grouping on local western

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[1] Embraces also Investigation and Suspension Docket No. 8536 (Sub-No. 2), Meat and PHP, TOFC, Southwestern-Western Trunk Line Terrs; and Investigation and Suspension Docket No. 8536 (Sub-No. 3), Meats and PHP, West and Southwest to the East.

rates, there is no merit to the two latter arguments since the overhead rates in the *Sterling* case were found not shown to be unlawful, and no finding was made therein concerning two-trailer rates;

And it further appearing, That the one cent difference between the Denver, Colo., rate group and the Sterling, Colo., rate group on local western rates on single-trailer shipments to Chicago, Ill., does not constitute bone fide compliance with the order entered in the *Sterling* case, but merely constitutes a lesser form of unjust discrimination against Sterling, Colo. than that which existed at the time the Commission, Division 2, rendered its decision in the *Sterling* case. In both instances the geographic advantage of Sterling, Colo. has been nullified by carrier action and to prevent a further repetition of this situation, it is necessary for the Commission to set, with specificity, the difference between the two rate groups that the respondents are to establish and maintain;

Wherefore, and good cause appearing therefor:

It is ordered, That the petition for clarification be, and it is hereby, granted to the extent hereinafter indicated.

It is further ordered, That the second ordering paragraph of the order entered on November 16, 1973, be, and it is hereby, deleted and replaced by the following interpretation paragraph:

> "*It is further ordered,* That, by way of interpretation, and to prevent any further misunderstanding, ultimate finding number 1 does not require the regrouping of origin points in the precise manner exemplified in the body of the report, except that Sterling, Colo., must be included in a lower-rated group than Denver, Greeley, and Pueblo, Colo., to comport with the tenor of the result in *Sterling Colorado Beef Co.* v. *Atchison, T. & S. F. Ry. Co.,* 339 I.C.C. 530, and the local western rates on single-trailer shipments from

> the groups in which Sterling is placed must reflect a spread under the rates from the group in which Denver is placed of at least five cents per hundred weight."

And it is further ordered, That the petition, except to the extent granted by the above clarification, be, and it is hereby, denied.

By the Commission.

/s/ ROBERT L. OSWALD
Robert L. Oswald
Secretary

(SEAL)

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 9th day of January, 1975.

INVESTIGATION AND SUSPENSION DOCKET No. 8536 (Sub-No.1)[1]

MEAT & PHP, TOFC, SWL, WTL, OFFICIAL TERRITORIES

Upon consideration of the record herein, including the report and order on reconsideration, 344 I.C.C. 299, the orders of November 16, 1973 and August 21, 1974 interpreting and modifying the prior order, the petition for clarification of the August 21, 1974 order filed on November 7, 1974 by Sterling Colorado Beef Company, and a reply thereto filed on December 23, 1974 by the respondents; and a petition filed on January 6, 1975 by American Beef Packers, Inc. in support of the petition for clarification; and

It appearing, That the second ordering paragraph of the November 16, 1973 order, as modified by the August 21,

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[1] Embraces also Investigation and Suspension Docket No. 8536 (Sub-No. 2), Meat and PHP, TOFC, Southwestern-Western Trunk Line Terrs; and Investigation and Suspension Docket No. 8536 (Sub-No. 3), Meats and PHP, West and Southwest to the East.

1974 order, required a spread of *at least* five cents between the group in which Sterling, Colo. is placed and the group in which Denver, Colo. is placed on local western rates on single-trailer shipments to Chicago, Ill.;

It further appearing, That the five cent differential set forth in the August 21, 1974 order is the minimum permissible spread between the rate groups and that the order did not require the cancellation of any rates providing a spread in excess of five cents;

Wherefore, and for good cause:

It is ordered, That the petition for clarification, except to the extent indicated in the above expression, be, and it is hereby denied.

By the Commission.

ROBERT L. OSWALD
Secretary

No. 35021

THE STERLING COLORADO BEEF COMPANY v. THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

Decided July 9, 1971

Upon reconsideration, maintenance of assailed rail trailer-on-flatcar rates on fresh meat and meat byproducts, from Sterling, Colo., to Chicago, Ill., found to be an unreasonable practice resulting in unreasonable rates. Assailed rates in other respects found not shown to be unlawful. Prior findings modified, reparation awarded, and appropriate order for the future entered.

Dale C. Dillon, William P. Sullivan, Edwin H. Pewett, Hershel Shanks, and *Thomas G. McGarry* for complainant.

R. J. Schreiber, T. O. Broker, S. R. Brittingham, Jr., J. J. Nagle, J. C. Danielson, G. M. Mariner, W. J. O'Brien, Jr., and *J. J. Burchell* for defendants.

REPORT OF THE COMMISSION ON RECONSIDERATION

DIVISION 2, ACTING AS AN APPELLATE DIVISION, COMMISSIONERS WALRATH, BUSH, AND GRESHAM

BUSH, *Commissioner:*

The modified procedure was followed. By decision and order (not printed) on March 23, 1970, Review Board Number 4 affirmed and adopted the statement of facts, conclusions, and findings of the hearing examiner that the assailed trailer-on-flatcar (TOFC) rates[1] on fresh meat and meat byproducts from Sterling, Colo., to Chicago, Ill., were and are unjust and unreasonable in violation of section 1(5) of the Interstate Commerce Act for movements delivered or tendered for delivery on and after July 29, 1966, to the extent such rates ex-

[1]Rates and charges are stated in cents per 100 pounds unless otherwise indicated.

ceeded those sought by the complainant; and that rates of the railroad defendants[2] were unduly and unreasonably preferential of shippers at Greeley, Denver, and Pueblo, Colo., and were unduly and unreasonably prejudicial to complainant at Sterling in violation of section 3(1) of the act. The decision and order also awarded reparations, but on a slightly different basis than that used by the examiner. Upon petitions for reconsideration by the complainant and the defendants, the proceeding was reopened for reconsideration on the present record.

By complaint filed July 29, 1968, it was alleged that the joint rail rates collected by the defendant railroads on an unspecified quantity of TOFC carload shipments of fresh meats and meat byproducts transported from complainant's plant in Sterling to Chicago, as well as to certain eastern destinations beyond Chicago, were unjust and unreasonable, in violation of section 1(5) of the act, and were unduly preferential to complainant's competitors at Greeley, Denver, and Pueblo in violation of section 3(1) of the act. The complainant seeks reparations based on the difference between the rates applies and those requested here on all shipments made during the 2-year period preceding the filing of the instant complaint, as well as shipments *pendente lite*.

Complainant is a purchaser, slaughter, and processor of livestock. It ships meats and meat byproducts from its plant at Sterling to Chicago and eastern destinations beyond via defendants' TOFC rail service. Complainant contends that the assailed rates from Sterling to Chicago are the same as the TOFC rates maintained by defendants from Denver, Greeley, and Pueblo to the same destination, although the distance from Sterling to Chicago is 141 miles shorter than from the three origins unduly preferred. On shipments from Sterling to points east of Chicago rates in the table below apply to Chicago and the local rates apply beyond. Defendants compute freight rates using the Sterling-Chicago rates as part of combination through rates. Complainant further contends that the overall combination rates, using the Sterling rate as a factor, are unjust and unreasonable to the same extent as the factor.[3]

The assailed rates from Sterling to Chicago are shown below:

[2]The Atchison, Topeka and Santa Fe Railway Company, Chicago, Burlington & Quincy Railroad Company, Chicago Great Western Railway Company, Chicago and North Western Railway Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Illinois Central Railroad Company, Norfolk and Western Railway Company, and Union Pacific Railroad Company.

[3]Complainant introduced substantial evidence that competition in sales among producers at Chicago and west coast markets is highly intense.

Minimum weight	Basic rate excluding general increases	Rate including Ex Parte No. 256 increase	Rate including Ex Parte No. 259 increase
Pounds	*Cents*	*Cents*	*Cents*
35,000	128	131	135
38,000	122	125	129
70,000	115	118	122
80,000	110	113	116

Complainant maintains that the effect of grouping Sterling with its competitors in the TOFC rates to Chicago denies complainant at Sterling its natural geographic advantage of its relative proximity to that market, and affords its competitors at the other three Colorado points an undue advantage. Complainant compares minimum earnings per car-mile from Sterling to Chicago to various eastern destinations. The comparisons are shown in the table below:

Comparison of revenue returns per car-mile from Sterling TOFC plan II, minimum 35,000 pounds

To—	Rate[1]	Distance	Return per mile[2]
	Cents	*Miles*	*Cents*
Chicago	138	883	102.48
Albany, N. Y	225	1,672	94.20
Baltimore, Md	220	1,639	93.96
Bangor, Maine	276	2,062	93.70
Boston, Mass	249	1,856	93.90
Bristol, Va	191	1,412	94.68
Connellsville, Pa	187	1,389	94.24
Cumberland, Md	199	1,477	94.32
Elmira, N. Y	205	1,527	93.96
Hagerstown, Md	209	1,546	94.64
Hartford, Conn	240	1,788	94.30
Springfield, Mass	240	1,772	94.02
New Haven, Conn	242	1,804	92.90
Norfolk, Va	239	1,738	95.16
Philadelphia, Pa	228	1,695	94.16
Portland, Maine	259	1,928	94.04
York, Pa	215	1,602	93.94

[1]Including general increases through Ex Parte No. 262.

[2]Computed on the basis of two trailers on one flatcar, each trailer at the minimum weight.

The evidence of record shows that the joint-line TOFC rates applicable from the four named Colorado origins to destinations east of Chicago and to destinations on the west coast are in each instance constructed on, or related to, a mileage basis which accords the lowest rate between the least distant origin and destination, thereby

giving each producing plant its natural geographic advantage of its location and proximity to the competing market. For example, Sterling is 1,856 miles from Boston and is accorded a single-factor through joint rate of 249 cents, while the more distant competitive plants at Denver, Pueblo, and Greeley are accorded rates ranging from 262 to 266 cents. From Sterling to Los Angeles, Calif., the TOFC rate is 159 cents for a distance of 1,283 miles, while from Denver to Los Angeles the rate is 133 cents for the mileage factor of 1,158 miles. Defendants maintain joint-line single-factor TOFC rates from Sterling to many destinations east of Chicago which are related to the docket No. 28300 mileages[4] between all points. Further, comparable rates are published from the competitive Colorado origins to a larger number of eastern destinations based on the same mileage formula which accords each competitive origin point a rate commensurate with its geographic proximity to the destination station.

It is further established of record that prior to the advent of TOFC service, the transportation of these same commodities under refrigerated boxcar rates from competitive producing origins in western trunkline territory to Chicago, as well as to destinations east thereof, were also based on a mileage factor which accorded each producer the geographic benefit of its distance to the market destinations.

It is defendants' position that the TOFC rates from Denver, Greeley, and Pueblo to Chicago were established to meet motor carrier competition, then applied to Sterling under the intermediate rule, where the motor carrier rate to Chicago was and is the same as the motor carrier rate from Denver, Greeley, and Pueblo to Chicago.[5] The establishment of a group basis on the movement of this commodity is not justified from Sterling when rates are established on a *mileage basis* for other points in the Colorado origin area. For example, all of the cattle for the plants at the competitive origins are purchased from the *same* market and drawn from the *same* general area, i.e., northeast Colorado. Labor costs are the *same* for all slaughterhouses in these origins. Evidence was introduced of substantial competition at Sterling and from other competitive points from whence meat is moving into Chicago.

The tables below, compiled from the defendants' evidence, show the development of motor and rail rates in the considered areas:

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[4]Unless otherwise indicated, the docket No. 28300 scale are those prescribed in *Class Rate Investigation, 1939*, 262 I.C.C. 447, and later reports, as modified by subsequent general increases.

[5]Complainant's plant was completed at Sterling in April 1966, and there is no evidence that this traffic moved from the origin point to Chicago prior to that date.

Motor carrier commodity rates on fresh meats (in cents per 100 pounds)
To Chicago, Ill.[1]

From–	In effect on										
	(A) May 19, 1962	(A) May 30, 1964				(A) July 20, 1966				(B) October 1, 1970	
	Minimum weight	Minimum weight				Minimum weight				Minimum weight	
	25M	*25M*	*30M*	*35M*	*38M*	*25M*	*30M*	*35M*	*38M*	*35M*	*38M*
Denver, Colo	142	142	138 a-129	128	122	142	138	128	122	151	b-145
Greeley, Colo	c-142	c-142	---	---	---	142	138	128	122	151	b-145
Pueblo, Colo	c-142	c-142	---	---	---	c-142	---	---	---	a-151	ab-145
Sterling, Colo	---	---	---	---	---	ad-142	ad-138	ad-128	ad-122	e-151	eb-145

[1]Short-highway distances to Chicago from Denver, Greeley, Pueblo, and Sterling are 1,002, 973, 1,061, and 878 miles, respectively.

a–Maintained in J. B. Montgomery, Inc., MF-I.C.C. No. 2 only.
b–Applicable only on fresh meats, frozen, in boxes.
c–Maintained in RMMTB MF-I.C.C. No. 137 and J. B. Montgomery, Inc., MF-I.C.C. No. 2 only.
d–Rate of this amount was established in RMMTB MF-I.C.C. No. 131, effective November 5, 1966.
e–Maintained in RMMTB MF-I.C.C. No. 171 and J. B. Montgomery, Inc., MF-I.C.C. No. 2 only.
M–Denotes thousands of pounds.

(A)–Item 3400 of RMMTB tariff 2-E, MF-I.C.C. No. 137; J. B. Montgomery, Inc., MF-I.C.C. No. 2; Scott Truck Line, Inc., MF-I.C.C. No. 1.
(B)–Item 3855 of RMMTB tariff 2-F, MF-I.C.C. No. 171; J. B. Montgomery, Inc., MF-I.C.C. No. 2; Scott Truck Line, Inc., MF-I.C.C. No. 1.

Rail plan II TOFC rates on fresh meats (in cents per 100 pounds) from Denver, Greeley, Pueblo, and Sterling, Colo., to Chicago, Ill.[1]

Minimum weight	In effect on (A) August 28, 1959	(B) November 20, 1964	(C) July 20, 1966
Pounds			
25,000------	a-129	a-142	b--142
30,000------	---	135	138
35,000------	---	128	128
38,000------	---	122	122
#-70,000------	---	115	115
#-80,000------	---	110	110

	In effect on (D) July 29, 1968			(E) November 20, 1970			
	Basic rate	X-256 level	X-259-A level	Basic rate	X-259-B level	X-262 level	X-265 level
Pounds							
25,000 -----	b-142	145	149	---	---	---	---
30,000 -----	138	141	145	141	148	157	165
35,000 -----	128	131	135	131	138	146	153
38,000 -----	122	125	129	125	131	139	146
#-70,000 -----	115	118	122	118	124	131	138
#-80,000------	110	112	116	113	119	126	132

[1]Short-line distances to Chicago from Sterling, Greeley, Denver, and Pueblo are 883, 952, 1,006, and 1,024 miles, respectively.

a—Applicable only from Denver, Pueblo, and Sterling.
b—Applicable only from Denver and Pueblo.
#—Shipment to be loaded in not more than two trailers.
X-256—Ex Parte No. 256 increase.
X-259-A—Interim Ex Parte No. 259 increase.
X-259-B—Ex Parte No. 259 increase.
X-262—Ex Parte No. 262 increase.
X-265—Interim Ex Parte No. 265 increase, subject to the customary refund provisions.
(A)—Item 3275 of WTLC tariff 445, I.C.C. No. A-4103.
(B)—Item 1410-A of WTLC tariff 445-B, I.C.C. No. A-4525.
(C)—Item 1410-F of WTLC tariff 445-C, I.C.C. No. A-4595.
(D)—Item 5840 of WTLC tariff 445-E, I.C.C. No. A-4700.
(E)—Item 5840 of WTLC tariff 445-F, I.C.C. No. A-4766.

As seen, the assailed TOFC rates from competing origins and Sterling were established at the same level as the already existing motor rates.

The facts of record show that market competition in the meat buying industry is so intensive that even a slight variance in the quoted

price of the commodity, which includes freight charges, is sufficient to cause a loss or a gain of a sale. Furthermore, substantial reliance upon complainant's mileage comparisons from competitive points more distant from Chicago, and upon the fact that the assailed TOFC rates produce substantial car-mile revenues are evidentiary facts entitled to considerable weight.

On petition, defendants question the soundness of the relative reasonableness doctrine referred to in the review board's decision and order. They argue that there is no evidence of relative unreasonableness presented here as found by the review board. We disagree. A rate may be unreasonable in relation to another, or relatively, as a result of comparing the two. A rate likewise may be unreasonable in relation to cost, in relation to a prescribed basis of rates, *or in relation to any other satisfactory standard* which permits us to measure and determine the factual question presented. Broadly, then, it may be said that every unreasonable rate is "relatively unreasonable." Therefore, *all* factors in the evidence of record must be taken into account, and no single one is determinative in establishing the reasonableness or unreasonableness of assailed rates pursuant to section 1(5) of the act. We have considered the intense market competition in the meat industry, mileage comparisons from competitive points more distant from Chicago, car-mile revenues to arrive at our findings, and have given sufficient weight to the substantive evidence presented of the TOFC and motor carrier rate history from Sterling and the other involved points to Chicago. That history shows that the rail single-car rates were established at the *same* level as the motor rates from the competitive points. There is evidence of record, moreover, that these motor rates have moved meat traffic. While it is, however, not within our province to adjust carrier established rates solely to equalize marketing disadvantages growing out of unfavorable business geographical locations, consideration of all of the foregoing factors leads to the finding on reconsideration that it was, and is, an unreasonable practice to charge rates on the traffic described herein from Sterling to Chicago which were and are higher than those set forth in appendix A hereto during the periods there indicated, plus general increases authorized and applicable *pendente lite*, but that the assailed rates otherwise are not shown to have been or to be unlawful.

While complainant attacks the through combination rates over Chicago to points east thereof and alleges a section 3(1) violation, its evidence relates only to the factor to Chicago. Accordingly, we find and conclude that the evidence does not prove that the through rates are otherwise unlawful. *United States* v. *Beaumont, S. L. & W. Ry. Co.*, 301 I.C.C. 231, 234.

On reconsideration, we find that it was and is an unreasonable practice to charge rates on the traffic herein described; that the complainant paid and bore the charges at the rates herein found to have been unlawful; and that it is entitled to reparation thereof to the extent of the difference between the charges paid and those which would have accrued at the rates herein prescribed, including shipments moving *pendente lite*, with interest. The complainant should comply with rule 100 of the Commission's General Rules of Practice. The prior findings are so modified. An order for the future will be entered.

COMMISSIONER GRESHAM, dissenting:

I cannot agree with the practice of grouping Sterling with Greeley, Denver, and Pueblo is an unreasonable practice. The motor carrier competition, on a group rate basis, is the dominant factor in this case, to which the majority has failed to give sufficient weight.

It is ordered, That the defendants herein, to the extent that they participate in the transportation be, and they are hereby, notified and required to cease and desist on or before August 30, 1971, and thereafter to abstrain from the violation of section 1 of the Interstate Commerce Act, herein found to exist.

It is further ordered, That the said defendants be, and they are hereby, notified and required to establish on or before August 30, 1971, upon not less than 1 day's notice to this Commission and to the general public by filing and posting in the manner prescribed under section 6 of the act, and thereafter to maintain and apply rates not exceeding those set forth in appendix A to the report herein, plus subsequently authorized general increases.

And it is further ordered, That this order shall continue in full force and effect until the futher order of the Commission.

By the Commission, Division 2, Acting as an Appellate Division.

ROBERT L. OSWALD,
Secretary.

(SEAL)

APPENDIX A

TOFC rates prescribed on fresh meats and meat byproducts from Sterling, Colo., to Chicago, Ill., (in cents per 100 pounds)

Minimum weight	Rate excluding general increases	Rate including Ex Parte No. 256 increase effective date August 19, 1967	Rate including Ex Parte No. 256 and interim 259 increases effective date June 24, 1968	Rate including Ex Parte Nos. 256 and 259 increases effective date November 28, 1968	Rate including Ex Parte Nos. 256, 259, and 262 increases effective date November 18, 1969
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
Pounds					
35,000	114	117	121	123	130
38,000	108	111	114	117	124
70,000[1]	101	104	107	109	116
80,000[1]	96	99	102	104	110

[1]Applicable when two trailer loads are tendered.

No. 76-757

Supreme Court, U. S.
FILED
JAN 26 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

STERLING COLORADO BEEF COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

MOTION TO AFFIRM

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-757

STERLING COLORADO BEEF COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the judgment of a three-judge district court (J.S. App. 1a-9a) affirming an order of the Interstate Commerce Commission which approved a restructuring of trailer-on-flat-car (TOFC) railroad rates throughout the country (J.S. App. 13a-46a).[1] The

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[1]The district court also reviewed the Commission's orders in a separate proceeding involving reparations for certain TOFC movements under previous rates. Its judgment remanding that proceeding to the Commission is also before this Court on appeal in *Burlington Northern, Inc., et al. v. Sterling Colorado Beef Co.*, No. 76-672.

Commission's decision approved a rate structure, more reflective of railroad operating costs, that established common rates for groupings of certain western origin points.

In early 1970, a group of railroads[2] filed with the Commission schedules proposing new or revised TOFC rates and charges, and proposing new rules, regulations, and practices affecting those rates and charges (340 I.C.C. 214, 215). Numerous shippers, including Sterling Colorado Beef Company, the appellant herein, filed protests to the proposed rates. The Commission suspended the effective date of the schedule and instituted an investigation. In its report and order issued in December 1970, Division 2 of the Commission found that the proposed rate schedule, including the groupings of the western origin points, was just and reasonable (*id.* at 246).

Upon reconsideration, the entire Commission affirmed the findings of Division 2, with certain modifications not pertinent here (J.S. App. 13a-46a). The Commission also found that, so long as the carriers grouped the local western rates within the guidelines established in *City of Wilmington* v. *Alabama G.S.R. Co.*, 316 I.C.C. 709, 319 I.C.C. 620, the rates would not be determined to be unduly preferential or prejudicial in violation of Section 3(1) of the Interstate Commerce Act, 24 Stat. 380, as amended, 49 U.S.C. 3(1) (J.S. App. 36a-38a).

The Commission subsequently clarified its decision in response to a petition by the railroads by advising the railroads that Sterling, Colorado, must be placed in a grouping different from Denver, Greeley, and Pueblo (J.S. App. 47a-48a). The railroads then grouped Sterling with McCook, Nebraska, and established an eastbound rate for

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[2]The railroads involved are enumerated at 340 I.C.C. 215 n. 2.

that new grouping which was one cent lower than the eastbound rate for the Denver grouping. This action prompted appellant to file its own petition for clarification. The Commission then issued a further order, holding that "the local western rates on singletrailer shipments from the groups in which Sterling is placed must reflect a spread under the rates from the group in which Denver is placed of at least five cents per hundred weight" (J.S. App. 50a-51a). Appellant thereupon filed a further petition for clarification, and the Commission responded by issuing another order stating that its prior order required a spread of *at least* five cents between Sterling and Denver on local western rates on single-trailer shipments to Chicago, and that it did not require cancellation of any rate providing a spread in excess of five cents (J.S. App. 51a-52a).

Appellant then filed a complaint in the United States District Court for the District of Colorado seeking to set aside the Commission's decision insofar as it approved the new Sterling rate. The district court sustained the Commission's orders. The court concluded that the Commission acted reasonably by permitting grouping of origins instead of requiring distance-related rates (J.S. App. 7a). The court observed that "[t]here is no controlling law requiring that the Commission establish rates which are distance related" and concluded that "there is substantial evidence in the record supporting the determinations made" (J.S. App. 7a-8a). This included evidence with respect to "traffic flow, distribution of terminal costs, empty-trailer return ratio to volume of TOFC traffic and motor competition * * *" (J.S. App. 6a).

ARGUMENT

The judgment of the district court is correct, and the appeal presents no question warranting plenary consideration by this Court.

Appellant contends that the district court "abdicated its reviewing function" by failing "to identify the substantial evidence which purportedly supported the administrative decision and * * * to explain how the purported substantial evidence rationally related to the agency result" (J.S. 10). The contention is insubstantial.

This Court has never held that a court reviewing an agency decision under the substantial evidence standard must identify in a written opinion the specific evidence that it finds to be substantial. Cf. *Reyes* v. *Secretary of Health, Education and Welfare*, 476 F. 2d 910, 912 n. 1 (C.A. D.C.). It is sufficient if the reviewing court examines the record and states its conclusion that there is a substantial evidentiary basis for the agency's findings. See *Illinois C.R. Co.* v. *Norfolk & W.R. Co.*, 385 U.S. 57, 65-66.[3]

Appellant's contention reduces to the claim that, contrary to the district court's conclusion, the Commission's determination is not supported by substantial evidence. But appellant "has not met its burden of demonstrating that the [district court] misapprehended or grossly misapplied the substantial-evidence standard." *Mobil Oil Corp* v. *Federal Power Commission*, 417 U.S. 283, 330.

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[3]*Nickol* v. *United States*, 501 F. 2d 1389 (C.A. 10), on which petitioner relies, is not applicable. The issue in *Nickol* was whether the district court had properly granted summary judgment under Rule 56, Fed. R. Civ. P., in the face of allegations that the agency's decision was not supported by substantial evidence. That issue is not present in this case. Moreover, *Nickol* required only that the district court "indicate at least in general terms" the substantial evidence it found so that the court of appeals would know how the district court reached its conclusion. *Id.* at 1392. The district court here met that test (J.S. App. 6a). As this Court recently reiterated in *Ralston Purina Co.* v. *Louisville & Nashville R.R. Co.*, No. 75-1015, decided June 14, 1976, weighing the evidence and resolving evidentiary conflicts are tasks for the Commission, not the courts.

Thus, appellant argues (J.S. 17-23) that the Commission should have adopted distance-related rates rather than allowing origin grouping. But this Court has long recognized the propriety of origin or destination grouping for ratemaking purposes. *Ayrshire Collieries Corp.* v. *United States* 335 U.S. 573; *Illinois Commerce Comm'n* v. *United States*, 292 U.S. 474, 486; *United States* v. *Illinois Cent. R.R.*, 263 U.S. 515, 522.

Here, as in other instances, the Commission reasonably determined that "adopting a maximum limitation on the grouping of points, rather than a distance scale, [would ensure that] all shippers and localities are treated fairly, and yet the railroads gain a freer hand to adjust rates in response to competition" (J.S. App. 37a). As the district court correctly stated, this "adjustment of rates in light of changing technologies and transportation conditions is precisely the kind of delicate balancing process for which the Commission's expertise deserves the most deference" (J.S. App. 6a).

Contrary to the appellant's assertion, the Commission took into account the specific situation of appellant within the new rate structure. Sterling was placed in a grouping different from other Colorado cities. The accommodation of the Sterling shippers gives more weight to Sterling's distance from Chicago "without depriving the carriers of a fair opportunity to restructure their heretofore depressed rates" (J.S. App. 39a).

The Commission carefully balanced a variety of transportation factors, including distance and competition. Appellant is not happy with the balance, but it has cited "no controlling law requiring that the Commission establish rates which are distance related" (J.S. App. 7a-8a).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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Interstate Commerce Commission.

JANUARY 1977.

JAN 21 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-757

THE STERLING COLORADO BEEF COMPANY,

Appellant,

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, BURLINGTON NORTHERN INC., et al.,

Appellees.

On Appeal from the United States District Court for the District of Colorado

MOTION TO AFFIRM

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Appellees, Burlington Northern Inc., et al.,[1] pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment and decree of the District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

[1] The railroad appellees include Burlington Northern Inc., Union Pacific, Illinois Central Gulf, Chicago & North Western Transportation Co., and Milwaukee Road.

STATEMENT

This is a direct appeal from the final judgment and decree entered on August 17, 1976, by a District Court of three judges specially constituted pursuant to 28 U.S.C. Sections 2284 and 2325, dismissing appellant's complaint which sought to set aside an order of the Interstate Commerce Commission.

In the late 1960's the nation's railroads conducted a thorough review of the nationwide trailer-on-flat-car (TOFC) meat rate structure. As a result of that review it was decided to restructure the TOFC rates on all traffic originated by the western and southwestern meat packing industry. This tariff proposal, when filed with the Interstate Commerce Commission, was protested by all the major meat packers[2] and suspended for the statutory seven month period. The proceeding was docketed by the Commission as I&S 8536 and assigned for oral hearings, which lasted several weeks.

As part of this proposal the railroads established origin groupings for all traffic moving on the local western rates to Chicago. Of all the meat packers which protested the new rate structure, only appellant Sterling Beef Company directed their protest to the concept of origin grouping.[3] As to Colorado origins, the concept of origin groupings dated from the establishment of TOFC meat rates in 1962, when the railroads initiated such rates from Denver and Pueblo to Chicago. Thereafter, as

[2] These protestants included Oscar Mayer and Co., George A. Hormel & Co., Rath Packing Co., John Morrell & Co., Armour & Co., Swift & Co., Wilson-Sinclair Co., Wilson Certified Foods, Inc., Wilson Beef Traffic Association, Illini Beef Packers Inc., Texas Packers, Sterling Colorado Beef Co., Wilson Beef & Lamb Co., Packerland Packing Co., Colorado Meat Dealers Association, and the Midwest Packers Traffic Association.

[3] See 340 I.C.C. 214, 227.

meat packers, including appellant Sterling Beef, located new plants in Colorado they were all placed in the Colorado group with identical rates to Chicago.

The initial decision of the Commission, by one of its divisions, found that the carriers' proposal, including origin grouping, to be just and reasonable and the new rates became effective as of December 30, 1970. MEAT & PHP, TOFC, SWL, WTL, OFFICIAL TERRITORY, 340 I.C.C. 214 (1970).

Certain of the meat packer protestants filed petitions for reconsideration with the entire Commission. Once again, on review, only the appellant, Sterling Beef Company continued to attack the concept of origin groupings. Upon reconsideration, the entire Commission sustained the basic findings of Division 2, including approval of origin groupings. This Commission decision, however, did modify certain of the Division's findings regarding a hold down on the magnitude of percentage increases. MEAT & PHP, TOFC, SWL, WTL, OFFICIAL TERRITORIES, 344 I.C.C. 299 (1973).

Subsequent to this decision the Commission issued additional orders on clarification which required the rail carriers to place Sterling Beef Company in an origin group with Nebraska origins at a rate differential 5¢ below the other Colorado meat packers on the rate to Chicago.

Appellant then brought this action in the U. S. District Court for Colorado, seeking to have that Court order that it was entitled to strictly distance related rates. However, the District Court affirmed the Commission, holding that there is no controlling law requiring that the Commission establish rates which are solely distance related and that there was substantial evidence in the record supporting the determination made by the Commission.

ARGUMENT

The decision of the District Court is plainly correct. The question presented is so unsubstantial as not to need further argument. The appellant correctly states that the judicial review function is one to determine if there is "substantial evidence" to sustain the administrative agency decision. However, appellant conveniently ignores the voluminous evidence of record before the Commission in leaping to the conclusion that there is no "substantial evidence" to support the Commission's findings regarding the origin grouping concept.

Essentially, it was and is appellant's position that it is entitled to strictly distance related rates, regardless of competitive conditions or the cost of service. Courts had traditionally recognized that the Commission has never adopted a doctrinaire position that all rail charges which are not strictly distance related are unlawful.[4] In this case, there was substantial evidence relating to justification for origin groupings under a nationwide TOFC meat rate structure. This evidence consisted of both intermodal competitive factors and market competitive conditions. Specifically, in regard to Colorado origins there was evidence that group rates were

[4] *e.g.* In *New York Central Railroad Co. v. United States*, 207 F. Supp. 483, 490 (1962), Judge Friendly succinctly stated the rationale for this recognition as follows: "One reason is that although distance must have some effect on rail transport cost, the relationship is by no means direct. Even on transportation in the same direction over the same line, a heavy proportion of total cost is represented by originating and terminating expenses, as well as overhead expenses, such as accounting, which do not vary with mileage. When different carriers are involved, still other factors enter into the comparison. Neither has the Commission ever insisted that rates to or from competing markets or ports should cover costs by precisely the same margin." At page 490.

especially appropriate due to the identity of interest among all Colorado meat packers. As Division 2 of the Commission noted in their decision:

> "* * * All the cattle for the plants of Denver, Greeley, Pueblo and Sterling are purchased from the same market and drawn from the same general area, that is, northeastern Colorado. Since it is admitted that labor costs are essentially identical, rail rates and operating efficiency are the only competitive variables between the Colorado meat packing plants." 340 I.C.C. 214, 228.

Indeed, this fact was conceded by appellant's witness in this case. In addition to these market competitive conditions, there was substantial evidence regarding intermodal competitive factors. Division 2 in its decision in this case recognized that TOFC meat rates were first established to meet motor carrier competition in the transportation of fresh meats. 340 I.C.C. 214, 219.

In the decision of the entire Commission in this case this factor was noted as one of the reasons for approving a group rate adjustment. The Commission stated:

> "Shippers in our view are not entitled under the Act to have competitive rail rates at all points. Specifically, we will not prescribe a distance oriented scale of rail rates to compete with prevailing motor carrier rates where (1) the railroads are not obtaining the variable cost from the service, (2) shippers of meat have relied more and more on motor carriers' service and (3) the motor carriers have a distinct service advantage. We consider a greater discretion to adjust rates particularly important for the carriers in situations like those present here where the increases involved will not return excessive profits to the carriers." at p. 322 (App. 36a)

It is clear that appellant's objective in this case is simply to have the Courts declare that all rail carrier rates must be distance related, regardless of their

attempts to recast the issue as one involving lack of substantial evidence to justify the Commission's findings.

As pointed out earlier, this proceeding before the Commission involved a national restructuring of the TOFC meat rate structure and this appellant was the only protestant to attack the origin grouping concept. Naturally, the Commission devoted the major portion of its decision to a consideration of the ramifications of the carriers' nationwide rate adjustment. Therefore, it cannot be rightfully criticized for its consideration of the appellant's position as part of a broader perspective. Clearly, to have granted appellant distance related rates would have undermined the entire nationwide rate adjustment and, in fact, given appellant an additional unfair advantage over other meat packers similarly situated.

Appellant's reference to the prior precedent allegedly established in its earlier complaint case[5] is clearly distinguishable. That case involved a complaint by an individual shipper which was handled by the Commission under its modified procedure regulations. This procedure involves the submission of written statements and argument by both parties with no oral hearings or cross-examination of witnesses. In that case a three-member panel of Commissioners acting as Division 2, in a split two-to-one decision, ordered the carriers to grant Sterling distance related rates to Chicago. This decision was never reviewed by the entire Commission.

In contrast, this case involved several weeks of hearings and a broad review of the entire TOFC meat rate structure. The decision of the entire Commission

[5] *Sterling Colorado Beef co. v. AT&SF R. Co.*, 339 I.C.C. 530 (1971).

was unanimous in regard to the origin grouping concept. The Commission also clearly articulated the reasons for distinguishing its action in this case from that of Division 2 in the earlier *Sterling* complaint case as follows:

> "In *Sterling Colorado Beef Co. v. AT&SF Railway Co.*, 339 I.C.C. 530, Division 2 removed Sterling Colorado from the carriers grouping of that point with Denver, Greeley and Pueblo to give it the benefit of a shorter distance to Chicago. The Division found that the establishment of a group basis for the rates from Sterling to Chicago was not jusitifed whenever rates were established on Docket No. 28300 mileage basis from points in the Colorado origin area to destinations other than Chicago.
>
> "* * * Unlike Sterling, the present proceeding involves a very broad adjustment of the rates; nevertheless, the result reached in this proceeding likewise leaves Sterling in a reasonable relation with all other points. * * *" at pp. 319-320 (App. 33a-34a)

Under the review standard sanctioned by this Court in *Bowman Transportation Inc. v. Arkansas—Best Freight System, Inc., et al.*, 419 U.S. 281 (1974), it is clear that there was a rational basis for the Commission's conclusion in this case and it is evident that the decision was based on a consideration of all relevant factors involved in the national rate structure. Further, if the Commission is to be permitted to continue to exercise its expertise in rate matters, disapproval of strictly distance related rates in a national rate case cannot reasonably be considered a clear error of judgment by the Commission.

CONCLUSION

Wherefore, appellees respectfully submit that this case is of marginal importance in that the questions raised by appellant are so unsubstantial as not to need further argument. Therefore, appellees respectfully move the Court to affirm the judgment entered in this cause by the District Court for the District of Colorado.

Respectfully submitted,

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REPLY TO MOTIONS TO AFFIRM

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REPLY TO MOTIONS TO AFFIRM

1. The Government's motion to affirm does not question appellant's assertion that the district court failed to identify the substantial evidence which, in the district court's view, supported the Interstate Commerce Commission decision. The Government claims, however, that a reviewing court is not required to "identify in a written opinion the specific evidence that it finds to be substantial." (p. 4). This is an astounding assertion! If we read the Government's contention right, a litigant entitled to judicial review under the substantial evidence rule may go into court contending that the agency decision is unsupported by substantial evidence, and the reviewing court adequately discharges its reviewing responsibilities by telling the litigant, "The agency decision *is* supported by substantial evidence, but in our judicial majesty we decline to tell you what that evidence is." The Government

does not put its position so bluntly, but this position is clearly reflected in the Government's statement that "It is sufficient if the reviewing court examines the record and states its conclusion that there is a substantial evidentiary basis for the agency's findings." (p. 4).

The Government fails to cite any direct authority for the propositions quoted above. Its effort to garner support for its position by case citations introduced by "cf." and "see" signal to the careful reader how inapt these citations are. A reading of these cases will confirm that, if anything, they support Sterling's position here.[1]

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[1] In *Reyes* v. *Secretary of Health, Education and Welfare*, 476 F.2d 910 (D.C. Cir. 1973), the Court admonished the district court to state at least which findings it deemed unsupported, where the court had reversed on a motion for summary judgment a decision of the Secretary for lack of substantial evidence. 476 F.2d at 912 n. 1. The Court quoted with approval from *Celebrezze* v. *Zimmerman*, 339 F.2d 496, 498 (5th Cir. 1964), involving an appeal under the Social Security Act in which the District Court similarly reversed the Secretary of H.E.W. on a summary judgment motion:

> [I]n the rare case in which it is appropriate for the trial court to reverse the Secretary's findings because there is no substantial evidence to support them it would make it much easier for this Court, on appeal, to have the benefit of the trial court's analysis of the evidence, and the reasoning by which it arrives at its determination that it is unable to find support in the record for the Secretary's findings.

In *Illinois Central Railroad Company* v. *Norfolk & Western Railway Company*, 385 U.S. 57, 65-66 (1966), also cited by the Government in support of its contention, the Court never even addressed the issue involved here. The issue there concerned whether the district court had in fact applied the proper standard of review. The Court concluded that the proper test was applied, *i.e.*, "whether the action of the Commission is supported by 'substantial evidence' on the record viewed as a whole." 385 U.S. at 66.

What we find incredible, however, is that the Government should present an argument to this Court which is directly contrary to the position it has recently taken in at least two courts of appeals.

Compare the second paragraph on page 4 of the Government's motion to affirm, from which we quoted above and which we quote in full in the margin,[2] with what the Government has told the Ninth Circuit in its briefs in *Edwards* v. *Kleppe*, No. 75-3770, a case still *sub judice:*

> The district court did not discuss any of the evidence in the administrative record in any way. Without such an analysis of the record evidence this Court cannot possibly know why the district court was persuaded to reject the factual findings and legal analysis by the Secretary and his hearing examiner, set forth in two separate and substantial opinions. The lower court's naked conclusion woefully fails to meet the directives of *United States* v. *Nickol*, 501 F. 2d 1389 (C.A. 10, 1974). In *Nickol* the Tenth Circuit held that, when the standard of review of administrative action is whether the administrator's decision is supported by substantial evidence in the administrative record, *the district court may not make a cursory conclusion, without discussing the content of that record, that the decision is supported by substantial record evidence. The reviewing court must point out its path of reasoning and which record evi-*

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[2] In its brief here the Government states: "This Court has never held that a court reviewing an agency decision under the substantial evidence standard must identify in a written opinion the specific evidence that it finds to be substantial. Cf. *Reyes* v. *Secretary of Health, Education and Welfare*, 476 F. 2d 910, 912 n. 1 (C.A.D.C.). It is sufficient if the reviewing court examines the record and states its conclusion that there is a substantial evidentiary basis for the agency's findings. See *Illinois C.R. Co.* v. *Norfolk & W.R. Co.*, 385 U.S. 57, 65-66."

dence it found compelling in its decision. 501 F. 2d 1391, 1392 (emphasis added). [Brief for appellant, pp. 9-10.]

> Although this synopsis of material record facts in an administrative review on summary judgment need not be of the Rule 52, F.R. Civ. P., variety, the principles governing Rule 52 findings should apply by analogy. . . . *The district court must show how it evaluated the evidence in that record, which evidence it considered as the substantial evidence required to support the agency decision or why the evidence fell short of that necessary quantum,* and *how this evidentiary evaluation factored into the court's conclusion.* [Reply brief for appellant, pp. 3, 5 (emphasis supplied).]

It would certainly be interesting to know how the Government reconciles what it is telling the Court in this case with what it told the Ninth Circuit in the *Edwards* briefs quoted above.

Similarly, in *Hill* v. *Morton,* 525 F.2d 327 (10th Cir. 1975), the Government took the same position before the Tenth Circuit as it has now taken before the Ninth Circuit in the *Edwards* case—in direct conflict with the position it takes here. In the *Hill* case it was the Government that was arguing that the district court failed to cite the facts in the administrative record which justified the district court's decision. In the *Hill* case, the Government cited and relied on the *Nickol* case, as we do here, despite the fact that the *Nickol* case was a summary judgment case while the *Hill* case was a simple review of an administrative record. Yet in the instant case the Government attempts to distinguish the *Nickol* case on the ground that the issue there arose on motions for summary judgment. (Government's motion to affirm, p. 4 n. 3). The Government makes this distinction here despite the fact that in *Hill* the court accepted the Government's argument and further ruled that it made no difference whether the issue arose in the district court on motions for summary judgment or on review of an administrative record. The court in *Hill,* in ruling for the Government, rejected the distinction of *Nickol* which the Government urges here. The court stated:

> In essence, those cases [*Nickol* and a similar case thereafter] place an affirmative duty upon a district court reviewing administrative action to engage in substantial inquiry of the relevant facts as developed in the administrative record and then to define, specifically, those facts which it deems supportive of the agency decision if that is the court's resolution of the matter. The purpose of this rule is simply to provide an adequate basis for appellate review.[3]
>
> Here, the district court concluded only that the agency was arbitrary and capricious, but offered neither an explanation of the manner in which the conclusion was reached nor a statement of which facts in the administrative record, or the absence thereof, were relied on in reaching its conclusion.
>
> With basis for the district court's disposition of the matter obscure, proper appellate review is precluded. Therefore, the judgment appealed from must be vacated and the matter remanded for fur-

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[3] Compare *Multiple Use, Inc.* v. *Morton,* 504 F. 2d 448, 452 (9th Cir. 1974):

> Thus, a bald conclusion by the trial judge (that sufficient evidence does or does not exist to support the Secretary's decision that there had or had not been a sufficient discovery) is of no aid to this Court in making its own decision that such sufficient evidence exists, and that the district judge relied upon it.

> ther proceedings consistent with the principles announced in *Nickol* and *Heber Valley*. We recognize that this case stands in a slightly different procedural posture than either *Nickol* or *Heber Valley*, in that technically it was not decided on a Rule 56 (Fed. R.Civ.P.) motion for summary judgment. However, this minor dissimilarity is without real significance in this case in view of the proceedings in the district court which were, for all practical purposes, summary in nature.

Regrettably, the Government speaks to the judiciary on this issue with a forked tongue—or rather out of both sides of its mouth. That the Government takes opposite positions before different appellate courts on this issue emphasizes the need for plenary review of this important question here.

2. While the Government's motion to affirm implicitly concedes that the district court did not specify the substantial evidence which supported the agency decision, the railroads' motion to affirm, on the other hand, seeks to find support for the agency decision on new evidence never before mentioned in this judicial review proceeding.

For the first time in this judicial review proceeding, the railroads seek to justify the agency decision to allow grouping Sterling with other more distant Colorado origins on the ground that, quoting Interstate Commerce Commission Division 2's decision, all cattle processed by Sterling and the preferred origins are purchased from the same market and both Sterling and its more distant competitors pay the same labor rates (railroads' motion to affirm, p. 5). Presumably, in the railroads' view, this is sufficient to justify according Sterling and its more distant competitors the same freight rates.

Suffice it to say that the district court did not rely on this evidence to support the Commission decision, the full Commission decision did not rely on this evidence, and even Division 2 (from which the railroads quote) did not rely on this evidence as a reason justifying grouping.

It is a measure of how far the railroads must reach to find evidence supporting grouping that they now, for the first time, cite this evidence as the first, and presumably most persuasive, argument in support of the assailed grouping.

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